No. 03-636
Title: Garrison S. Johnson, Petitioner
v.
California, et al.
Docketed: October 29, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-56436)
Decision Date: February 25, 2003
Rehearing Denied: July 28, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 10 2002	Reply of petitioner Garrison S. Johnson filed.
Oct 27 2003	Petition for a writ of certiorari filed. (Response due November 28, 2003)
Nov 18 2003	Waiver of right of respondents California, et al. to respond filed.
Dec 3 2003	DISTRIBUTED for Conference of January 9, 2004.
Dec 8 2003	Response Requested . (Due January 7, 2004)
Dec 31 2003	Order extending time to file response to petition to and including January 28, 2004.
Jan 27 2004	Brief of respondents James Gomez and James Rowland in opposition filed.
Feb 9 2004	Reply of petitioner Garrison S. Johnson filed.
Feb 11 2004	DISTRIBUTED for Conference of February 27, 2004.
Mar 1 2004	Petition GRANTED.
Mar 15 2004	Extension of time to file the joint appendix and petitioner's brief on the merits to and including May 17, 2004.
Mar 15 2004	Extension of time within which to file respondents' brief on the merits to and including July 21, 2004.
May 6 2004	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 4, 2004.
May 18 2004	Brief amicus curiae of Pacific Legal Foundation filed.
Jun 3 2004	Joint appendix filed.
Jun 3 2004	Brief of petitioner Garrison S. Johnson filed.
Jun 4 2004	Brief amici curiae of American Civil Liberties Union,et al. filed.
Jun 4 2004	Brief amicus curiae of United States filed.
Jun 4 2004	Brief amicus curiae of Former State Corrections Officials filed.
Jun 16 2004	Further extension of time within which to file respondent's brief on the merits to and including August 6, 2004.
Aug 6 2004	Brief of respondents James Gomez and James Rowland filed.
Aug 6 2004	Brief amicus curiae of National Association of Black Law Enforcement Officers, Inc. filed.
Aug 6 2004	Brief amici curiae of Utah, et al. filed.
Aug 18 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 19 2004	CIRCULATED.
Sep 1 2004	SET FOR ARGUMENT Tuesday, November 2, 2004.

Sep 27 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Sep 28 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 28 2004	Record received from U.S.D.C. Central California. (1 box and 1 envelope)
Nov 2 2004	Argued. For petitioner: Bert H. Deixler, Los Angeles, Calif., and for the United States, as amicus curiae, Paul D. Clement, Acting Solicitor General, Department of Justice, Washington, D.C. For respondent: Frances T. Grunder, Senior Assistant Attorney General, San Francisco, Calif.

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state's practice of routine racial segregation of state prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded under *Turner v. Safley*, 482 U.S. 78 (1987)?

2. Does California's practice of routine racial segregation of state prisoners for at least a 60-day period violate the Equal Protection Clause?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 321 F.3d 791 (9th Cir. 2003). Pet. App. at 1a. The Ninth Circuit affirmed the July 30, 2001, decision of the United States District Court for the Central District of California, which is unreported. Pet. App. at 32a. The Ninth Circuit's opinion denying a petition for rehearing with suggestion for rehearing en banc (with four judges dissenting) is reported at 336 F.3d 1117 (9th Cir. 2003). Pet. App. at 36a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on February 25, 2003. Pet. App. at 1a. A timely petition for rehearing with suggestion for rehearing en banc was denied on July 28, 2003. Pet. App. at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 2.

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

For more than 25 years, the California Department of Corrections (CDC) has followed a practice of segregating prisoners by race in two-person cells upon arrival at or on transfer between its institutions. CDC administrators contend that security concerns related to possible violence among inmates necessitate its segregationist practice. When petitioner Garrison S. Johnson (Johnson), an African-American, first arrived at a CDC institution in 1986, CDC personnel told him that he had to be placed in a "black cell." On each subsequent occasion when the CDC transferred Johnson to a different institution, his initial cell assignment was based on his race and he was placed in a cell with another African-American.

Johnson filed his original complaint on February 24, 1995, alleging that the CDC's policy of racial segregation violated his right to equal protection under the Fourteenth Amendment. In ultimately rejecting Johnson's position, the Ninth Circuit declined to follow this Court's decision holding such segregation unlawful in *Lee v. Washington*, 390 U.S. 333 (1968), and also declined to follow this Court's decisions in a long line of cases holding that all state actions discriminating on the basis of race are subject to strict scrutiny, most recently *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003),

and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). Instead, the court applied the more relaxed standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), which evaluated whether certain prison regulations *that were not race-based* were reasonably related to legitimate penological interests. While noting that the standard of review was outcome determinative, the Ninth Circuit declined to apply the strict scrutiny ordinarily accorded racial classifications. Pet. App. at 11a. Applying *Turner's* relaxed review, the court upheld the CDC's policy of racial segregation.

A. The CDC's Policy of Routine Racial Segregation

All newly arriving CDC inmates, whether on first assignment or on transfer, are initially housed in a "reception center." The CDC requires such inmates to complete a form that asks only: "Name/Number," "Security/Custody Level," and "Ethnicity/Race." The CDC admittedly "use[s] . . . race as *the* predominant factor" to determine double-cell housing assignments in the reception center. *Id.* at 3a, 20a (emphasis added).

Prison officials' testimony demonstrated that this CDC segregation practice stems from anecdotally-based views of the tendencies that inmates of particular races have to be violent toward inmates of other races, rather than from specific data or evidence. *Id.* at 3a-4a. The CDC bases its practice of racial segregation on the grounds that "in its experience, race is very important to inmates and it plays a significant role in antisocial behavior." *Id.* at 3a. Thus, the CDC immediately classifies inmates as "black, white, Asian, and other." *Id.* Officials further subclassify inmates based on national origin. By CDC practice, inmates of particular national origins are not housed together because, according

to CDC administrators, "they tend to be at odds with one another." *Id.* "[F]or example[,] Japanese and Chinese inmates are not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos." *Id.* In support of its policy, the CDC offered no evidence of particular instances of racial tension in two-person cells causing damage to prison security, discipline, or order. The CDC instead relied on generalized accounts of racial conflict in certain prisons (not prisons in which Johnson has resided), without specific discussion of any relation between housing assignments and the outbreak of violence.

The CDC contends that the confined nature of cells makes them different from non-segregated facilities within CDC prisons. *Id.* at 4a. Because they have been largely unsuccessful in preventing the existing level of racial violence in areas where staff can easily observe the inmates, CDC administrators worry that they would be unable to protect inmates in their cells from the violence they believe would likely arise from interracial assignments. *Id.* The CDC argues that each prison routinely needs a 60-day period of racial segregation to determine whether a newly arrived inmate poses a danger to others. *Id.* After 60 days, the inmate is assigned a cell or transferred to another institution, where, during its reevaluation, the CDC will continue to racially segregate him for another 60 days. *Id.* at 4a-5a.

B. Proceedings in the District Court

After having been racially segregated numerous times, Johnson filed a complaint, in pro per, in federal district court alleging that the CDC's policy violated his constitutional rights. On January 8, 1998, the district court dismissed the Third Amended Complaint without leave to amend and

Johnson appealed. The court of appeals reversed in part the district court's dismissal on March 21, 2000, and remanded, holding that Johnson's allegations were sufficient to state a claim for racial discrimination in violation of the Fourteenth Amendment. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) (relying on *Lee v. Washington* and citing *Turner v. Safley*).

On remand, the district court appointed counsel for Johnson and granted leave to file a Fourth Amended Complaint, in which Johnson sought monetary damages and injunctive relief. Discovery was conducted and all parties sought summary judgment on the equal protection claims. On June 11, 2001, the district court denied the summary judgment motions, as well as the CDC administrators' motion for summary judgment based on qualified immunity. After the Supreme Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), however, respondents Rowland and Gomez successfully moved for reconsideration of the denial of their motion for summary judgment based on qualified immunity. On July 30, 2001, the district court granted this motion, holding that under *Saucier* the former administrators were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. at 34a-35a.

C. Proceedings in the Ninth Circuit

The Ninth Circuit Court of Appeals affirmed the district court, holding that the segregation policies were entitled to a presumption of constitutionality and that Johnson had not rebutted that presumption. *Id.* at 31a.

The court recognized that under *Lee v. Washington*, racial segregation in prisons violates equal protection, except when

prison authorities, acting in good faith, find segregation necessary in particularized circumstances to maintain security, discipline, and order. *Id.* at 8a-9a. The court discounted decisions from sister circuits[1] applying *Lee* to invalidate segregationist prison policies, reasoning that in those cases — which it characterized as featuring more invidious and pervasive racial segregation — "the standard of the court's review probably did not matter." *Id.* at 11a. By contrast, the panel saw this case as a close one requiring determination of the applicable standard of scrutiny. *Id.*

The court applied *Turner's* "relaxed standard" to Johnson's racial equal protection claim, rather than the strict scrutiny evidently applied in *Lee*, based on its understanding that the *Turner* standard applied to determine the constitutionality of *all* prison regulations, *including* those involving racial segregation.[2] *Id.* at 11a-13a. The court also relied on *Washington v. Harper*, 494 U.S. 210, 224 (1990), in which this Court, considering a substantive due process claim related to forced administration of anti-psychotic drugs, described the *Turner* standard as applicable when the needs

1. The court discounted *United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973), in which the Tenth Circuit held that an unsubstantiated fear of racial violence does not provide authority to segregate inmates on the basis of race into separate tanks or cell blocks. Pet. App. at 10a-11a. The court similarly discounted the Fifth Circuit's ruling, in *Sockwell v. Phelps*, 20 F.3d 187, 191-92 (5th Cir. 1994), that permanent segregation of cell mates based on race violated the Equal Protection Clause. Pet. App. at 10a-11a.

2. The court conceded, however, that *Turner* is not in fact applied to determine the constitutionality of all prison regulations. As the court noted, the Ninth Circuit has refused to apply *Turner* in the Eighth Amendment context. Pet. App. at 12a n.6.

of prison administration implicate constitutional rights. Pet. App. at 12a.

Johnson petitioned unsuccessfully for rehearing with a suggestion for rehearing en banc. Four judges dissented from the denial of rehearing. *Id.* at 38a. For the dissenters, Judge Ferguson observed that this Court has not overruled *Lee*, and distinguished *Turner* because it was not a case involving racial segregation:

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Id. at 41a n.1 (alteration in original) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). Judge Ferguson also noted that "[b]oth the Fifth and Seventh Circuits have refused to accord such extreme deference [to racial segregation by prisons], recognizing that, in the context of race, more must be required." Pet. App. at 44a. The dissenting judges found *Lee* controlling, especially in light of this Court's recent and repeated command that lower courts apply strict scrutiny to all race-based classifications. *Id.* at 39a-40a, 42a. Opining that the panel had effectively overruled *Lee*, the dissenters maintained that the panel was not free to apply *Turner* rather than *Lee*:

> [T]he panel simply does not have the authority to interpret *Turner* as requiring a different level of review. "If a precedent of th[e Supreme] Court had direct application in a case, yet appears to rest

> on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions."

Id. at 41a (Ferguson, J., dissenting) (alteration in original) (quoting *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Unlike the panel, the dissenters concluded that *Turner* did not supply the standard applicable to a state's practice of intentional racial segregation in the prison setting. Taking issue with the panel's analysis that Johnson has "a 'reasonable alternative' to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time," Judge Ferguson pointed out that "the panel essentially asserts that if the state only discriminates sometimes, no harm is done." Pet. App. at 45a-46a (Ferguson, J., dissenting) (quoting *Johnson v. California*, 321 F.3d 791, 804 (9th Cir. 2003)).

REASONS FOR GRANTING THE PETITION

Johnson respectfully requests that this Court grant the petition, and either summarily reverse or set this case for briefing and argument.

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial segregation. The decision below is in direct conflict with decisions of this Court and two circuit courts. More specifically, the decision below conflicts with: (a) the Court's decision in *Lee v. Washington*, holding that the Equal Protection Clause bars racial segregation in prisons,

except where found necessary in particularized circumstances to maintain security, discipline, and order; (b) the Court's decisions in *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), holding that all intentional state racial segregation is subject to strict scrutiny when challenged under the Fourteenth Amendment; (c) decisions from the Fifth and Seventh Circuits, holding that intentional state racial segregation in prisons always requires strict scrutiny; and (d) decisions from the District of Columbia and Eighth Circuits, holding that prison regulations that discriminate based on suspect classifications require heightened scrutiny. Moreover, the Ninth Circuit's extension of the relaxed standard of review employed in *Turner v. Safley* to claims of racial segregation raises an important issue that was either settled by this Court in *Lee*, or should be settled now. Permitting the Ninth Circuit's decision to stand would excuse state prison officials from having to justify their intentional racial segregation under strict judicial scrutiny, notwithstanding that intentional state racial segregation has been outlawed in this country for over half a century.

I. The Ninth Circuit's Decision Conflicts with This Court's Decisions Subjecting All Government Racial Classifications, Including Those in Prisons, to Strict Scrutiny

The standard of review applied by the Ninth Circuit conflicts with the Court's applicable precedents. The Court has repeatedly and definitively held that all governmental racial classifications are subject to strict scrutiny. This unwavering standard of scrutiny was reaffirmed last term

in *Grutter*, 123 S. Ct. 2325, and *Gratz*, 123 S. Ct. 2411, and has applied to state actors since 1989, when the Court decided *Croson*, 488 U.S. 469; *accord Adarand*, 515 U.S. 200. The Court has been unambiguous on this issue: "*[A]ll* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 123 S. Ct. at 2337-38 (quoting *Adarand*, 515 U.S. at 227) (emphasis added); *accord Gratz*, 123 S. Ct. at 2427 ("It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.' ") (quoting *Adarand*, 515 U.S. at 224). The Court applies "strict scrutiny to all racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.' " *Grutter*, 123 S. Ct. at 2338 (alteration in original) (quoting *Croson*, 488 U.S. at 493).

This Court has also made clear that strict scrutiny applies to racial segregation practiced by state prison authorities. This was established in the Court's opinions in *Lee v. Washington*, by the Fifth Circuit decision summarily affirmed in *Lee*, and by subsequent reference to *Lee* by this Court and its members.

The holding in *Lee* was that racial segregation in prison violates the Equal Protection Clause. Nothing in the decision reflects any different standard than that applied in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. The Court noted the state's objection that "the specific orders directing desegregation of prisons and jails make no allowance for the necessities of prison security and discipline," but stated that it did not read the district court's

order to bar consideration of those factors in implementing a remedy. *Lee*, 390 U.S. at 333-34. Similarly, the concurrence of Justices Black, Harlan, and Stewart cautioned the states that the reference to those considerations should not be taken "as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Id.* at 334. The decision of the three-judge court summarily affirmed in the brief decision was itself squarely based on the principle of strict scrutiny reflected in "*Brown v. Board of Education* and the numerous cases implementing that decision, [namely that] racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (citations omitted).

This Court's repeated citation to *Lee* demonstrates the case's continued vitality and plainly reflects that strict scrutiny, not any lesser standard, was applied. The Court cited *Lee* in *Hudson v. Palmer*, for example, for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be *essential* to 'prison security and discipline.' " 468 U.S. 517, 523 (1984) (quoting *Lee*, 390 U.S. at 334) (emphasis added). More recently, Justice Scalia specifically noted that *Lee's* "necessities" exception is applicable "only [in] a social emergency rising to the level of imminent danger to life and limb . . . [such as] a prison race riot." *Croson*, 488 U.S. at 521 (Scalia, J., concurring). Last term, Justice Thomas cited *Lee* as "indicating that protecting prisoners from violence *might* justify narrowly tailored racial discrimination." *Grutter*, 123 S. Ct. at 2352 (Thomas, J., dissenting) (emphasis added).

The more relaxed level of judicial scrutiny held applicable to different claims by prisoners, which the Ninth Circuit panel applied (and indicated was outcome-determinative here), was not formulated in a case involving racial segregation. In *Turner v. Safley*, the Court fashioned a standard of review for prisoner's constitutional claims that would accommodate a policy of judicial restraint necessitated by the special problems of prison management. *Turner*, 482 U.S. at 85. Reviewing prison rules that were claimed to violate prisoners' rights of expression and the right to marry, the *Turner* Court determined that a lower level of scrutiny was appropriate. Although these claims implicated important constitutional rights, the Court in *Turner* was not called upon to consider issues or cases related to equal protection, let alone race or other suspect classifications historically accorded heightened scrutiny under the Court's equal protection jurisprudence.

In *Turner*, the Court held that the proper standard for determining the validity of the First Amendment and due process claims then before it was to ask whether the regulation is "reasonably related to legitimate penological interests." *Id.* at 89. Thus, to evaluate whether those prison regulations could withstand scrutiny under the First Amendment and the Due Process Clause of the Fourteenth Amendment, the Court first applied a test comparable to rational basis review. *See, e.g., Harper*, 494 U.S. at 224-25 (describing the *Turner* test as requiring "rational" connection between the prison regulation and government interest put forward to justify it); *Pargo v. Elliott*, 49 F.3d 1355, 1356 (8th Cir. 1995) (same).

The Ninth Circuit's decision extends *Turner's* relaxed standard of review to prisoners' race-based equal protection

claims. If strict scrutiny applies to determine the constitutionality of well-intentioned policies such as affirmative action in higher education, *see Grutter* and *Gratz*, this Court's cases should not be construed as abandoning that standard when the challenged decision involves segregation of African-American prisoners, especially given the history of stigma and racial discrimination that such segregation calls to mind. As this Court has repeatedly held, equal protection demands strict scrutiny because racial classifications have the potential to cause severe societal harm. *Adarand*, 515 U.S. at 236. Racial classifications — let alone racial segregation — must be demonstrated to be "unquestionably legitimate" to counter their "pernicious" effects. *Id.*

II. The Decision Below Conflicts with Holdings of Four Other Circuit Courts That Prison Regulations Based on Suspect Classifications Require Heightened Scrutiny

Four courts of appeal — the Fifth, Seventh, Eighth, and District of Columbia Circuits — have held that the strict scrutiny prescribed by this Court's equal protection jurisprudence applies to governmental racial (or gender) discrimination in jails and prisons. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (applying heightened scrutiny to a policy of segregating two-person cells based on race; racial segregation of offending individual prisoners would require prison officials to make "an individualized analysis" that such action was "needed to stifle particular instances of racial violence"); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (applying strict scrutiny in a case of racial segregation of prisoners, holding that "absent a compelling state interest, racial discrimination in administering prisons

violates the Equal Protection Clause");[3] *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (heightened scrutiny applies, notwithstanding *Turner*, in cases involving gender-based discrimination by prison officials, citing *Lee v. Washington*); and *Pargo*, 49 F.3d at 1356-57 (8th Cir. 1995) ("Not all reviews of prison policies or practices require judicial deference. . . ."; holding that the district court erred in applying *Turner's* relaxed scrutiny, instead of the heightened scrutiny traditionally accorded gender-based equal protection claims).[4]

By contrast, two circuit courts of appeals — the Ninth Circuit in this case and the Fourth Circuit — apply the rational basis standard of *Turner*. *See Morrison v. Garraghty*, 239 F.3d 648, 654-66 (4th Cir. 2001) ("This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny, such as when an inmate claims that his constitutional right to equal protection of the laws has been violated by the prison's implementation of a racial classification.") (citations omitted).

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3. The Seventh Circuit decided *Black v. Lane* 12 days after the Supreme Court decided *Turner v. Safley*, and the precedent continues to bind courts in that circuit. *See, e.g., Wilson v. Schomig*, 863 F. Supp. 789, 793 (N.D. Ill. 1994) (citing *Black v. Lane* in context of prison racial equal protection claim).

4. Consistent with *Pargo*, district courts within the Eighth Circuit have held that strict scrutiny applies to prison racial classifications. *See Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999) (strict scrutiny applied to examine claim that prison officials used race as a primary factor for making housing assignments); *accord Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993) ("Racial discrimination in the administration of prisons violates the [E]qual [P]rotection [C]lause, unless it is justified by a compelling state interest.") (citing *Black v. Lane*, 824 F.2d at 562).

Other circuit courts have refrained from deciding whether heightened scrutiny should apply to suspect-class equal protection claims in the prison setting, though some district courts within those circuits have considered the issue. The Sixth Circuit has expressly reserved judgment on the issue, *Glover v. Johnson*, 198 F.3d 557, 561 (6th Cir. 1999) (declining to decide what standard of review applied to prisoners' gender-based equal protection claims because the law of the case and fact-finding below obviated the need to do so), although a district court in that circuit has held that the Equal Protection Clause prohibits discrimination in prisons based on race absent a compelling state interest. *Nedea v. Voinovich*, 994 F. Supp. 910, 916 (N.D. Ohio 1998) (confirming strict scrutiny would apply to an inmate's claim of racially motivated parole denial). Similarly, the Third Circuit has not yet opined on the issue, but a district court in that circuit reached the question, following the rule of *Turner* rather than *Lee*. *Simpson v. Horn*, 25 F. Supp. 2d 563, 572-73 (E.D. Pa. 1998).

Without resolution of this conflict by this Court, lower courts will continue to apply inconsistent standards in adjudicating race-based constitutional claims brought by prisoners.

III. The Issue Presented Is Recurring and of Exceptional Importance

Resolving the proper standard of review for examining segregationist prison policies is essential because of the far-reaching impact of state-sponsored discrimination. Over one hundred thousand California inmates are subject to admittedly segregationist government policies. Under the ruling of the court below, and in spite of this Court's

longstanding insistence that *all* intentional governmental racial segregation be strictly scrutinized, such policies and practices will escape appropriate judicial review in both the Ninth and Fourth Circuits.

The decision below undermines a national imperative to eliminate racial discrimination.[5] The very fact of California's official racial classification is offensive to the Fourteenth Amendment, a "core purpose" of which "was to do away with all governmentally imposed discrimination based on race." *Grutter*, 123 S. Ct. at 2346 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Furthermore, "[e]nshrining a permanent justification for racial [discrimination] would offend this fundamental equal protection principle." *Grutter*, 123 S. Ct. at 2346. In the face of this significant national goal, the Ninth Circuit's ruling permits the CDC's policy of routine racial segregation to continue without requiring the policy to be either narrowly tailored or to be in direct response to any extraordinary circumstance involving prison security, as required by *Lee*.

As this Court again recognized last term, the Equal Protection Clause prohibits the state from employing policies that look only at skin color and that fail to afford any individualized consideration to persons in recognition that they likely have relevant qualities other than skin color. *See Gratz*, 123 S. Ct. at 2428. It would be incongruous permit the CDC to dispense with the same individualized consideration in prison housing. Certainly strict scrutiny

5. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969; *entered into force for the United States* November 20, 1994).

should be required when state actors, in any context, replace individualized treatment with gross racial stereotyping.

The application of a lesser standard of review to prison-based claims of race discrimination not only subverts the Court's jurisprudence; it does so unnecessarily. Since *Lee v. Washington*, prison authorities have had "the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." 390 U.S. at 334 (concurrence). While running a prison is inordinately difficult and requires expertise, *Turner*, 482 U.S. at 85, the judiciary is uniquely able to review governmental policies of racial classification. *Croson*, 488 U. S. at 493; *Grutter*, 123 S. Ct. at 2338. Hence, it is for the judiciary to use strict scrutiny to " 'smoke out' illegitimate uses of race." *Grutter*, 123 S. Ct. at 2338 (quoting *Croson*, 488 U.S. at 493).

Strict scrutiny would not prohibit prison officials from acting where "a social emergency rising to the level of imminent danger to life and limb — for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens.' " *Croson*, 488 U.S. at 520 (Scalia, J., concurring) (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 35; *see, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Grutter*, 123 S. Ct. 2325. If prison policies of racial segregation are required to be narrowly tailored by a compelling government interest, this will not prevent prison authorities from instituting such policies when necessary.

There is no reason, in the prison context or any other context, to dilute the standard of review consistently applied by this Court to government policies of racial segregation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 25, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56436

GARRISON S. JOHNSON,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ, Director, Department of Corrections; JAMES ROWLAND,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Chief Judge, Presiding

Argued and Submitted
October 10, 2002—Pasadena, California

Filed February 25, 2003

Before: Procter Hug, Jr., Melvin Brunetti and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

Appendix A

OPINION

O'SCANNLAIN, Circuit Judge.

We must decide whether a prison reception center housing policy, which uses race as one factor in assigning a new inmate's initial cell mate for 60 days, violates the Equal Protection Clause.

I

Garrison Johnson is an African-American prisoner in the California Department of Corrections ("CDC"), serving his sentence for murder, robbery, and assault with a deadly weapon. On June 22, 1987, he was received at the California Institution for Men in Chino, California, and since that time has been transferred to a number of different facilities within the CDC. He has been through the inmate reception centers at Chino, Folsom, Calipatria, and is currently incarcerated at Lancaster. At each facility he was double-celled with another African-American inmate.

According to the staff testimony in the record, when an inmate arrives at a CDC institution either as a transfer from another facility or as a new inmate, he[1] is initially housed in a reception center. At the reception center, the inmate goes through a classification process. The CDC evaluates the inmate's physical, mental, and emotional health. The inmate must also provide vocational and educational goals that he wants to accomplish while incarcerated. Finally, the inmate

1. The complaint does not raise the question of female housing policies and the only plaintiff is male.

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is given a battery of tests. In making its decision, the CDC reviews the inmate's history in jail and any previous commitments to determine his security needs and classification level. The CDC also looks to see if the inmate has any enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, or inmates with whom he may have had disputes during previous incarcerations.

To determine the double-cell housing placement at the reception center, the CDC looks at several factors including, but not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history, custody designation, and race. Although race is only one of many factors, it is a dominant factor; according to the CDC, the chances of an inmate being assigned a cell mate of another race is "[p]retty close" to zero percent. The CDC considers race when making an initial housing assignment because, in its experience, race is very important to inmates and it plays a significant role in antisocial behavior.

Generally, inmates are listed in four general ethnic categories, black, white, Asian, and other. Within each of these categories, officials at the reception center further divide inmates, for example Japanese and Chinese inmates are generally not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos. Also, Hispanics from Northern California and Hispanics from Southern California are not housed together because, in the administrators' experience, they tend to be at odds with one another.

Linda Schulteis, the Associate Warden at California State Prison-Lancaster, testified that if race were not considered in making this initial housing assignment, she is certain that there would be racially based conflict in the cells and in the yard. She stated, "I am therefore not willing to knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate [*sic*] or group of inmates [*sic*] safety by taking steps that I know would result in violence and conflict." This view is unanimously seconded by other prison officials.

Although the rest of the prison is fully integrated—there is no distinction based on race as to jobs, meals, yard and recreation time, and vocational and educational assignments—according to the administrators, the confined nature of the cells makes them different from the other areas of the prison. Staff cannot see into the cells without going up to them, and inmates are capable of placing coverings over the windows so that staff cannot see in them at all. Moreover, inmates are confined to their cells for much of their day. Because of the current levels of racial violence occurring in areas where the staff can easily observe the inmates, the administrators are concerned that they would not be able to protect inmates who are confined in their cells. Thus, the administrators argue that they need 60 days to analyze each inmate on an individual basis to determine whether the inmate poses a danger to others.

After 60 days, the inmate either is assigned a cell within the current institution where he will be permanently housed or is transferred to another institution where his classification indicates that he would be more suited. If the inmate is

transferred, he again goes through the initial housing screening process. If the inmate stays at the institution and has the appropriate security classification, he may be transferred to a dormitory or a single cell.

Inmates assigned to a dormitory are considered nonviolent, and, thus, inmates of all races are housed together. The CDC does not use race as a factor to determine who is assigned to a dormitory, but within each dormitory it attempts to maintain a racial balance so as to reduce the likelihood of racial violence. Single-cell housing decisions are made completely independent from race. Johnson does not allege that either of these two housing policies violate equal protection.

If the inmate remains in a double cell, the CDC's goal is for inmates to select their own cell mate, so as to maximize the inmates' compatibility and to reduce the possibility of violence. There are designated forms that both inmates must sign indicating that they would like to share a cell together. Unless there are security reasons for not granting an inmate's request to share a cell with another inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions.

II

On February 24, 1995, Johnson as a pro se plaintiff filed his original complaint, alleging that the CDC's reception center housing policy violated his constitutional rights by assigning inmates' cell mates on the basis of race. In January 1998, the district court dismissed Johnson's Third Amended

Complaint without leave and Johnson appealed. We reversed the district court's dismissal in part on March 21, 2000 and remanded, holding that Johnson's allegations were "sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000).

On remand, Johnson was appointed counsel and granted leave to amend his complaint. He filed his Fourth Amended Complaint on July 5, 2000, seeking monetary damages. He alleged that James Gomez and James Rowland, former CDC Directors, in their individual capacities violated his constitutional rights by formulating and implementing the CDC housing policy. He also sought injunctive relief against Stephen Cambra, the current CDC director. Discovery was conducted, and both parties moved for summary judgment on the equal protection claims. Both were denied. The district court denied the administrators' summary judgment motion because the court concluded that there was a question of material fact regarding what happens to double-celled inmates following the 60 days in the initial reception center.[2]

The district court also denied the administrators' qualified immunity-based motion for summary judgment. After the Supreme Court issued its decision in *Saucier v.*

2. The parties to this appeal, however, no longer contend that the aftermath of the 60-day policy is relevant; Johnson's counsel at oral argument explicitly disavowed any challenge to the continuing effects of the CDC's housing policy and limited the challenge only to the 60-day policy itself. Thus, the only question before this court is whether the CDC's use of race to make the temporary 60-day housing decision violates the Equal Protection Clause.

Katz, 533 U.S. 194 (2001), however, Rowland and Gomez successfully moved for reconsideration of the denial of summary judgment. This time, the district court granted the motion, holding that under *Saucier* the former administrators were entitled to qualified immunity because their actions were not clearly unconstitutional. Johnson now appeals from the district court's grant of summary judgment for the administrators.

III

The Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), instructed that before we can determine whether state officials are entitled to qualified immunity, we must first address the merits of the alleged constitutional violation. The first question we must ask is whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [officials'] conduct violated a constitutional right?" 533 U.S. at 201. If we answer this question in the negative, then the inquiry is over and the case should be dismissed: we never reach the issue of qualified immunity. It is only when "a violation could be made out on a favorable view of the parties' submissions" that a court evaluating a claim of qualified immunity should proceed to "the next, sequential step [of] ask[ing] whether the right was clearly established." *Id.* Thus, in accordance with *Saucier*, we first turn to the merits of the case.[3]

3. Although a question of material fact did exist when the district court considered the case, precluding summary judgment on the merits, Johnson conceded that he is not challenging this question of fact anymore. As such, we must first address the merits of Johnson's claim. *Saucier*, 533 U.S. at 201.

Appendix A

A

Johnson alleges that the state's use of race in making initial housing assignments constitutes an impermissible racial classification afoul of the Equal Protection Clause.[4] The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The central mandate of this Clause "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *see also Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." (citation and internal quotations omitted)). Ultimately the Equal Protection Clause strives "to do away with all governmentally imposed discrimination based on race," *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citation and footnote omitted), because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The goal of eradicating invidious race discrimination is no less laudable in the prison context. In *Lee v. Washington*,

4. The state admits considering race when it assigns inmates their cell mate. Thus, the policy is suspect on its face, and Johnson need not prove a discriminatory intent or impact. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 n.27 (1978); *see also Hunter v. Erickson*, 393 U.S. 385, 389 (1969); *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967).

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390 U.S. 333 (1968), the Supreme Court tackled the issue of racial segregation in prisons. In a per curiam opinion, the Court held that an Alabama state statute requiring segregated cell blocks in jails and prisons violated the Equal Protection Clause of the Fourteenth Amendment. 390 U.S. at 333. *Lee*, however, also recognized that prisons present an inherently different situation than society at large. A three justice concurrence explicitly noted what the per curiam opinion implicitly recognized, that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Id.* at 334. The *Lee* majority has since been interpreted as holding racial discrimination within prisons unconstitutional, save for "the necessities of prison security and discipline." *See, e.g., Cruz v. Beto*, 405 U.S. 319, 321 (1972). Thus, while recognizing the important need to combat racial discrimination, even in prisons, the Court also recognized that the very nature of prisons may require the use of race-based criteria in official decisionmaking under limited circumstances.

Johnson does not dispute that *Lee* acknowledges that under some circumstances race may be considered in prison decisionmaking, but denies that this is one such instance. The "particularized circumstances" or "necessities of prison security and discipline" under which racial discrimination is permissible have never been defined by the Supreme Court or this court, and the meaning of these terms is not axiomatic. To make his argument, Johnson cites cases from our sister circuits that have addressed this issue and have held that an unsubstantiated fear of racial violence or a desire to protect

individuals against racial insensitivity does not provide the authority to segregate inmates on the basis of their race into separate tanks or cell blocks, *see, e.g., United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir. 1973) (holding assignment of inmates to East or West tanks by race unconstitutional); *McClelland v. Sigler*, 456 F.2d 1266 (8th Cir. 1972) (holding segregated prison wing unconstitutional), or to 2507 assign inmates permanent cell mates solely on the basis of race, *see, e.g., Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994). These cases, however, while helpful to understand what is clearly unconstitutional, do little to define the contours of "particularized circumstances" or "necessities of prison security and discipline" in the case at hand.[5]

5. Unlike *Lee*, *Wyandotte County*, and *McClelland*, where the prison officials segregated the prison into black and white cell blocks or tanks under the guise of promoting racial harmony, the CDC is integrated in full. Inmates of all races work together, eat together, and use the yard together. This case simply does not involve a similarly broad segregation policy. Moreover, unlike the permanent policies in place in all of the aforementioned cases, this is a temporary arrangement, lasting only 60 days, which, according to the CDC, permits it to learn more about the inmates before assigning them to a cell on a more permanent basis. The Tenth Circuit recognized this distinction in *Wyandotte County*. In deciphering the meaning of "particularized circumstances," the Tenth Circuit stated that *Lee* did "no more than recogniz[e] the commonly accepted principle that in the administration of prison affairs there may arise unusual situations in which security and discipline demand segregation for limited periods." *Wyandotte County*, 480 F.2d at 971 (footnote omitted). In this case, to run a safe prison system, the CDC contends that it must assign cell mates, partly based on the inmates' race, for 60 days so that it can find out more about the inmate and reduce violence within the prison system. The policy is limited to the dangers it seeks to alleviate.

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Given the invidious and pervasive nature of the segregation at issue in *Lee*, *Wyandotte County*, *McClelland*, and *Sockwell*, the standard of the court's review probably did not matter; in a close case such as the one at hand, however, the standard of review is paramount. In 1987, in recognition of the unique circumstances that prisons present, the Supreme Court promulgated a new deferential test for examining the constitutional rights of prisoners, *Turner v. Safley*, 482 U.S. 78, 89 (1987), a test that had not been applied in any of the cases Johnson relies upon.

B

In *Turner*, the Court held that although prisoners do not check their constitutional rights at the prison gates, *see Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."), a relaxed standard is used in determining

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Paramount, in this case, there is also no indication that the use of race in the CDC's decisionmaking disparately affects the inmates. In *Sockwell*, "white cells" received preferential treatment to "black cells"—"white two-man cells were called to showers and to sell plasma first, enjoyed better telephone and store privileges, and had a better view of the televisions," 20 F.3d at 190—and black inmates were deprived of privileges, such as work and plasma donation, while waiting for another black two-man cell to have an opening, *id.*; *see also McClelland*, 456 F.2d at 1267 (white cell blocks had better living conditions than black cell blocks). Similar disparate treatment is not present in this case: there are no allegations that African-American inmates receive unfavorable cell locations or disparate treatment as compared to their white or Hispanic counterparts. This is not a situation where prison administrators are rewarding inmates for their "intransigent racial attitudes." *McClelland*, 456 F.2d at 1267.

the constitutionality of all prison regulations.[6] *See, e.g., Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("[I]n *Turner* we adopted a *unitary*, deferential standard for reviewing prisoners' constitutional claims. . . ." (emphasis added)); *Washington v. Harper*, 494 U.S. 210, 224 (1990) ("We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."); *Morrison v. Garraghty*, 239 F.3d 648, 654-55 (4th Cir. 2001) (holding more deferential standard of *Turner* applies to equal protection claims within prisons). *Turner* recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," and that "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." 482 U.S. at 84 (citation and internal quotations omitted). According to the Court, "[s]ubjecting day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89. Thus, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

6. Although we refused to apply *Turner* in the Eighth Amendment context, we held that *Turner* is appropriate "where the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment." *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (en banc). Equal protection concerns come within *Turner*. *See id.* (citing *Griffin v. Coughlin*, 743 F. Supp. 1006, 1010-19 (N.D.N.Y. 1990) (applying *Turner* to equal protection claim but not to Eighth Amendment claim)).

Turner was not merely a cosmetic change in the Court's language. *Turner* ostensibly expanded the definition of "particularized circumstances" and "necessary for security and discipline," and lowered the prison administrators' burden to justify race-based policies. Under *Turner*, rather than the administrators bearing the burden of proving their housing policy constitutional, the inmate bears this "heavy burden": "To prevail, [Johnson] must overcome the presumption that the prison officials acted within their 'broad discretion.' " *Shaw*, 532 U.S. at 232. Thus, to the extent, if any, that *Turner*'s "reasonably related" standard and *Lee*'s "particularized circumstances" inquiry point to divergent paths, we are bound to follow *Turner*. With *Turner* as our guide, we now consider whether the administrators' temporary housing policy is reasonably related to their concern for increased racial violence.

IV

In *Turner*, the Court provided four factors to examine in determining whether the prison administrators' actions are reasonably related to a legitimate penological interest. First, a " 'valid, rational connection' [must exist] between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, we must determine "alternative means of exercising the right that remain open to prison inmates." *Id.* Third, we must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Fourth, we must determine whether "ready alternatives" to the CDC's policy are available. *Id.* The "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Id.*

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A

The first factor we must consider is whether there is a "valid, rational connection" between the policy and a legitimate government interest. "This requires us to determine whether the governmental objective underlying the policy is (1) legitimate, (2) neutral, and (3) whether the policy is 'rationally related to that objective.' " *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) (en banc) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

The prison administrators assert that their race-based housing policy protects the safety of inmates and staff pursuant to the first *Turner* factor. This is undoubtedly a legitimate penological interest. *Mauro*, 188 F.3d at 1059 ("[T]here is no doubt that protecting the safety of guards in general is a legitimate interest.").

The government objective must also be neutral. In this context, neutrality means that the government objective must be unrelated to racial discrimination. *Cf. id.* at 1059. Although the CDC uses race to make its temporary housing assignments, the housing policy does not provide any advantage or disadvantage to any particular race,[7] and the objective, reducing violence among the inmates and against

7. If, for example, whites were treated more favorably in cell locations or privileges than blacks as they were in *Sockwell*, 20 F.3d at 190, the policy could not be sustained as neutral and the policy would likely be struck down under *Turner*. *See Morrison*, 239 F.3d at 656 ("The perniciousness of a race-based classification is not lessened simply because we afford more leeway to prison officials in the operation of their facilities. . . .").

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the staff, has nothing to do with race, but rather with inmate and staff safety. Because the prison administrators use race as a factor in making their initial housing assignments, "solely on the basis of [its] potential implications for prison security," the policy is considered neutral in the manner that *Turner* used that term. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989) ("Where . . . prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, [as opposed to reasons related to the 'suppression of expression,'] the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*."); *Mauro*, 188 F.3d at 1059.

Finally, we must determine whether a prison regulation is rationally related to the state's interest. According to Johnson, before the state's use of race as a factor in its decisionmaking can so qualify, *Lee* requires that it must first have an instance, specific to cell assignments, to which it can point to prove the necessity of such a policy. For example in *White v. Morris*, 832 F. Supp. 1129, 1130 (S.D. Ohio 1993), the court allowed double cells segregated strictly along racial lines only after ten people, nine inmates and one corrections officer, were murdered during an eleven-day racial riot, and the integrated double-celling was cited as a primary factor in the riot. 832 F. Supp. at 1130.

Under Johnson's view, the same violence would have to occur within the CDC in order to permit race to be considered as a factor in making initial housing decisions. We disagree.[8]

8. Although we decline to decide if indeed Johnson is correct that *Lee* would have required actual violence arising out of double-

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While the administrators simply cannot make "[r]outine and automatic arguments" that protecting the "constitutional rights of prisoners will lead to a breakdown in institutional discipline and security,"[9] *Cleavinger-v. Saxner*, 474 U.S. 193,

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celling specifically, Johnson's argument cannot withstand our consistent application of *Turner*. *See, e.g., Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

9. In this case, the administrators' reasoning is not an automatic response. The high level of racial violence in the CDC is well documented, and the administrators are well within their discretion to attempt to rectify or to reduce further violence by taking reasonable measures.

As one example, B. O'Neil, Associate Warden of Pelican Bay, a California State prison, described the numerous instances of racial violence that have caused Pelican Bay to be on lockdown for most of the last couple of years. The current problems started on June 1, 1998, when a riot broke out involving 39 Northern and Southern Hispanic inmates. The Hispanic population was put on lockdown in Facility A and although attempts were made to lift the lockdown, the Southern population continued to be locked down for over 14 months. In August 1999, a controlled release of Southern Hispanics resulted in a number of incidents with Northern Hispanics. The numerical superiority of Southern Hispanics and the likelihood of future violence between the two groups caused the prison administrators to move all Northern Hispanics to other institutions. 90 inmates were involved in a riot between the Fresno Bulldogs and the Southern Hispanics on March 12, 1999.

On March 15, 1999, "White Supremacists" and "Skinheads" attacked whites that were not affiliated with a gang and Northern Hispanic inmates. In total, 31 inmates were involved in this fight.

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Three days later, a riot involving 39 inmates occurred when Northern Hispanics attacked white inmates. The inmates were placed on lockdown until April 14, 1999. On August 31, 1999, another riot occurred in which over 100 black inmates attacked a smaller number of white inmates. Nine days later, a racial disturbance involving seven black inmates and four white inmates occurred on the yard. On September 27, 1999, another riot occurred involving 30 black inmates and three white inmates.

A major racial riot, involving 250-300 inmates, broke out on February 23, 2000 when Southern Hispanics, joined by some of the white inmates, attacked the black inmates. Prison administrators were required to use lethal and non-lethal force to quell the riot. Sixteen inmates were shot, one fatally, and in all, 25 inmates were taken to outside hospitals. Again, the prison was placed on lockdown. On March 24, 2000, Facility A began to allow segregated releases, but Facility B remained on lockdown. In light of information that further assaults were going to take place, prison officials again locked down the prison and searched the complex. The search revealed 78 deadly weapons and 142 items of "dangerous contraband." Because of the continuing danger of racial conflict, the prison remained on lockdown. As of April 20, 2001, the prison officials had thus far failed to remove the lockdown without causing further violence. Declaration of B. O'Neil, Associate Warden of Pelican Bay, at 1-4 (Apr. 20, 2001).

Numerous other incidents involving racial violence in the prison system have been reported in the media. *See, e.g.*, Sue Fox, *Lancaster Prison Locked Down after Riot Hurts 10, L.A. Times*, Aug. 9, 2000, *available at* 2000 WL 2267920; *Racial Fight Erupts at Prison, San Diego Union Trib.*, Mar. 3, 2000, *available at* 2000 WL 13951973; Ben Goad, *Race Riot Hits Adelanto Prison: More than 100 men are moved out of the private facility*, *Press Enterprise* (Riverside, Ca.),

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207 (1985), *Turner* clearly does not require such a high threshold before a state can act. *See Abbott*, 490 U.S. at 417 ("We agree that it is rational for the Bureau to exclude materials that, although not necessarily 'likely' to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) ("[*Turner*] ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. . . .' " (quoting *Turner*, 482 U.S. at 89)); *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) ("In the instant case, the defendants provided the penal institution superintendent's affidavit stating that the materials in question could lead to violence committed both by and against its readers. This constitutes a threat to prison security."); *see also Gates v. Rowland*, 39 F.3d 1439, 1447-48 (9th Cir. 1994). For example, in *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993), we held that under *Turner* anticipated security problems were sufficient to sustain regulations that were reasonably related to the problem, even though the

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Mar. 3, 2000, *available at* 2000 WL 7016883; Jeff Barnard, *Racial Fights an Inescapable Fact of Prison Life, San Diego Union-Trib.*, Feb. 26, 2000, *available at* 2000 WL 13950567; Steve Gessinger, *Violence Mounts as Racial Gangs War in Prisons, L.A. Sentinel*, Mar. 25, 1998, *available at* 1998 WL 11413300; Newsday, *Riot in Calif. Prison, 1 Dead, L.A. Times*, Sept. 28, 1996, *available at* 1996 WL 2538090; Newsday, *80 inmates Hurt in Calif. Jail Brawl*, Jan. 11, 1994, *available at* 1994 WL 7431676.

In short, this is hardly a case where the prison administrators are acting on an unsubstantiated record.

state did not cite a specific instance justifying its policy: "The [Arizona Department of Corrections's] failure to specify a past event wherein a contact visit resulted in assault, escape, or hostage-taking, does not render irrational the adoption and implementation of a non-contact policy." *Casey*, 4 F.3d at 1521. The CDC simply does not have to wait until inmates or guards are murdered specifically because race is not considered in assigning an inmate's initial cell mate; instead, *Turner* allows the administrators to stave off potentially dangerous policies without first "seeing what happens."

Under our precedent, if there is a common-sense connection between a legitimate objective and prison regulation, the inmate bears the burden of production.[10] *Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999). If the inmate fails to proffer sufficient evidence to refute a common-sense connection between the government's objective and the prison regulation, assuming that "the governmental objective is legitimate and neutral, *Turner*'s first prong is satisfied." *Id.* (internal citation omitted). On the other hand, if an inmate presents "sufficient (pre or post) trial evidence that refutes a common-sense connection between a legitimate objective and a prison regulation," *id.*, then the administrators bear the burden of proving that the "connection is not so 'remote as to render the policy arbitrary or irrational,' " *id.* (quoting *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999)).

10. Johnson cites a couple of cases from federal district courts where the defendants were required to prove the constitutionality of their policies. *See, e.g., Blevins v. Brew*, 593 F. Supp. 245, 248 (W.D. Wis. 1984); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1190 (S.D. Ohio 1979). Post-*Turner*, this is no longer the appropriate analysis.

Given the admittedly high racial tensions and violence already existing within the CDC, there is clearly a common-sense connection between the use of race as the predominant factor in assigning cell mates for 60 days until it is clear how the inmate will adjust to his new environment and reducing racial violence and maintaining a safer environment. *See White v. Morris*, 832 F. Supp. 1129, 1130 (S.D. Ohio 1993) (noting that race-blind double-celling increased racial tensions in the Ohio prison system). *But see Stewart v. Rhodes*, 473 F. Supp. 1185, 1188 (S.D. Ohio 1979) (pre-*Turner* case holding that prison administrators could not rely upon " 'common sense' attitude toward overall relations between the races in the face of expert testimony supporting an equally 'common sense' attitude" that "segregation . . . tends to create racial misunderstandings and tensions"). Indeed, in a previous case before us, a prisoner, alleging an Eighth Amendment violation because administrators failed to consider race when releasing inmates into the yards, argued that "individual prison cells are segregated because it is widely understood that members of different races would attempt to kill each other solely on the basis of gang membership or race." *Robinson v. Prunty*, 249 F.3d 862, 862 (9th Cir. 2001). Thus, the burden to refute this connection lies on Johnson.

Johnson does not disagree that racial violence is pervasive in the CDC,[11] but instead argues that the high levels

11. Referring to a racial riot at Calipatria State Prison, a prison from which he had recently been transferred, Johnson stated, "If I would have stayed there, I would have been involved in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based upon your [*sic*] skin color. I'm Black, and if I was there I would have been hurt." Deposition of Garrison Johnson, at 35 (Oct. 4, 2000).

of racial violence are evidence that the CDC's housing policy does not work. Johnson proffered deposition testimony from prison officials stating that the housing policy has been in place for over 20 years and that racial violence continues to permeate the CDC. Johnson also argues that some gangs are not formed strictly along racial lines, and thus the administrators' use of race is irrational as it is connected to reducing gang violence. This, according to Johnson, is sufficient evidence to rebut the common-sense connection that using race as a factor in determining initial housing assignments reduces racial tension and violence.

Johnson, however, misconstrues the administrators' argument and his burden on this point. The administrators do not contend that their housing policy is a magical elixir designed to cure all the racial and gang tensions within the prison; they contend only that without their policy, racial violence, both within the cells and in the recreation areas, would increase. Johnson has failed to offer any evidence to refute this connection. Just because racial violence already exists does not mean that pre-existing policies do not work to reduce that violence from being even more pervasive than it already is. Similarly the fact that some gangs are not based along racial lines does not rebut the connection between gangs and racial violence in prisons,[12] which even Johnson concedes is a problem.

12. In the past, we have noted the connection between prison gangs and racial violence. *See, e.g., Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry.").

Because Johnson failed to refute the common-sense connection between the policy and prison violence, the "government was not required to make any evidentiary showing concerning the connection." *Frost*, 197 F.3d at 357. Instead, we must presume the governmental objective is legitimate. *See id.* We do not have to agree that the policy actually advances the CDC's legitimate interest, but only "whether the defendants might reasonably have thought that the policy would advance its interests." *Id.* at 355 (quoting *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999)). In short, "as long as it is plausible that prison officials believed the policy would further a legitimate objective, the governmental defendant should prevail on *Turner*'s first prong." *Id.*; *see also Casey*, 4 F.3d at 1521 (holding rational connection was established when the anticipated security concern was not "unreasonable"). Here, it is plausible, given the racial violence and tensions already present in the CDC and the knowledge that in other prison settings race-blind housing assignments have caused violence, that the administrators believe using race as one factor in making an initial housing determination is necessary for inmate and staff safety. Therefore, *Turner*'s first prong has been met.

B

The second factor we must consider under *Turner* is whether alternative means of exercising the right remain open to prison inmates. "Where 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.' " *Mauro*, 188 F.3d at 1061 (ellipsis in

original) (quoting *Turner*, 482 U.S. at 90 (citations and internal quotation omitted)). Here, Johnson asserts the right to be free from race conscious decisionmaking while an inmate at the CDC.

In examining whether alternative means for Johnson to exercise his right exist, we must examine Johnson's right expansively and sensibly, *Abbott*, 490 U.S. at 417; thus, we must look to Johnson's right to be free from state-sponsored racial discrimination at a macro level, and not just the alleged violation, to determine whether alternatives open to the inmate exist. *Cf. id.* For example, in *Turner*, the Court viewed the alleged constitutional right at issue as the "freedom of expression" in totality, not the specific right to communicate with inmates at other institutions, although undoubtedly the restriction upon inmates' communication implicated their First Amendment rights. *Turner*, 482 U.S. at 92. The *Turner* Court held that because inmates had other means of expression available the inmates had alternatives to exercise their freedom of expression, even though their ability to communicate with inmates at other institutions was completely proscribed. *Id.* Likewise, in *O'Lone*, the Court held that inmates had reasonable alternatives to exercise their religious freedom by attending other Muslim ceremonies, even though they were prohibited from participating in the Jumu'ah religious ceremony in particular. 482 U.S. at 351; *see also Friedman v. State of Arizona*, 912 F.2d 328, 332 (9th Cir. 1990) (holding that inmates were not "denied 'all means of expression' of their religion" due to their ability to "participate in other aspects of their religion"). Accordingly, the correct analysis in this case is not whether the state has provided reasonable alternatives from the CDC's use of race

as a factor for the first 60 days, but whether the state has provided reasonable alternatives from racial discrimination in general.

We conclude it has. The policy in question lasts only 60 days—after which discrimination is no longer alleged—and there are no "black" cells or "white" cells. Moreover, the remainder of the prison is integrated in full without regard to race. There is no distinction based on race as to jobs, meals, yard and recreation time, and vocational and educational assignments. Just as the inmates in *Turner* and *O'Lone* had reasonable alternatives to exercise their constitutional rights, so too does Johnson.[13]

C

The third *Turner* factor requires us to examine what impact accommodating the inmate's asserted right will have on prison personnel, inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90. The CDC administrators contend that failing to consider race in making initial housing assignments would lead to increased racial violence both in the cells and in the common areas. The impact would be significant, jeopardizing the safety of all the inmates and prison staff.

13. Even if the alleged constitutional right, however, were viewed more narrowly and limited only to alternatives within the 60-day period, our ultimate conclusion would not be altered. *See Casey*, 4 F.3d at 1522 (refusing to remand to determine whether inmates had a reasonable alternative to the right at issue "because resolution of this factor in favor of the inmates would not alter our ultimate legal conclusion—that the *Turner* test of reasonableness is satisfied").

Johnson, however, contends that the administrators failed to proffer evidence that not using race as a factor would cause a strain on prison resources. Again, Johnson misconstrues *Turner*. The CDC does not have to prove that eliminating their policy would impact (1) prison personnel, (2) inmates, and (3) prison resources; rather, Johnson must prove that eliminating the CDC's housing policy would not affect one of these areas in a sufficient manner. *See Harper*, 494 U.S. at 227. Johnson has failed to do so.

To begin with, Johnson did not rebut the CDC's claim that racial violence would occur both in cells and in the recreation areas if the CDC did not take race into account. *See Frost*, 197 F.3d at 358 (noting that Plaintiff's failure to bear his burden on *Turner*'s first prong is relevant under the third prong as well). The administrators, moreover, affirmatively proffered evidence to show that inmate and guard safety would be compromised. The CDC administrators uniformly stated that failing to take race into account when making an initial housing decision would be dangerous to staff and inmates alike. Steven Cambra, the current CDC Director, in his declaration stated,

> If race were to be disregarded entirely . . . I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal

> with the problems that could arise. . . . I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time.

Declaration of Steven Cambra, Acting Director of Corrections, in Support of Defendants' Motion for Summary Judgment, at 3 (April 9, 2001); *see also* Deposition of Linda L. Schulteis, Associate Warden at California State Prison-Lancaster, at 32 (Dec. 6, 2000) ("You cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it.").

The Court found similar testimony persuasive in *Turner*. In *Turner*, the Court stated, "Prison officials have stated that in their expert opinion, correspondence between prison institutions facilitates the development of informal organizations that threaten the core functions of prison administration, maintaining safety and internal security." *Turner*, 482 U.S. at 92. As a result, the Court held that the asserted right could "be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike." *Id.*

Furthermore, prohibiting race to factor into the officials' decisionmaking process would have a "ripple effect" of not only increasing the level of violence within the cells, but in the common areas as well. *See, e.g., White*, 832 F. Supp. at 1130 (racially integrated double-celling attributed to a racial riot in which ten people were murdered); Steven Cambra,

Acting Director of Corrections, in Support of Defendants' Motion for Summary Judgment, *supra*, at 3; *cf. Turner*, 482 U.S. at 92; *Frost*, 197 F.3d at 358. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90. Accommodating the inmates' rights, thus, would be dangerous to staff and inmates in the views of the CDC. Without contrary evidence that the accommodation of the inmates' rights would not affect inmate and staff safety, we must defer to the judgment of the administrators.

D

The fourth factor we must examine is whether reasonable alternatives to using race as a factor in the initial housing policy would "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests. . . ." *Turner*, 482 U.S. at 91. This is not a "least restrictive alternative test"; it is a reasonableness test. Thus, while the regulation need not be a perfect fit to the solution at hand, it cannot be an "exaggerated response." *Id.* at 90. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* "The burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the regulation." *Mauro*, 188 F.3d at 1062.

Appendix A

Johnson argues that officials could screen inmates (1) on the basis of professed gang affiliation or (2) by examining the inmates' racial animus or a history of interracial violence, but he again has proffered no evidence in support of his position. Johnson's first proposed solution—that the prison officials could ask inmates about their gang affiliation or racial biases—is disingenuous. There is little chance that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate. *See* Deposition of Linda L. Schulteis, Associate Warden at California State Prison-Lancaster, *supra*, at 24 (noting that Northern Hispanic inmates cannot come to a Southern institution without being in danger, but that they will not inform the staff), 32-33 (noting that Japanese and Chinese prisoners will not tell officials of their animosity toward one another). Certainly, if this information was offered by the inmate or if the CDC knew of the inmate's past violence against an ethnic group, the CDC should take it into account, and perhaps even has a duty to consider it when making its housing assignment. *See Harper*, 494 U.S. at 223 ("Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, but also the duty to take reasonable measures for the prisoners' own safety." (internal citation omitted)); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001). Requesting that inmates provide potentially self-incriminating information themselves, however, does not provide sufficiently reliable data under which the CDC could make a meaningful decision. Without a guarantee of the veracity of the information, Johnson's argument does not provide a reasonable alternative.

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Johnson also has not shown that an examination of an inmate's past is reasonable. Even if a background check would provide accurate information regarding an inmate's propensity for racial violence outside prison, it is unclear whether that information would provide a true picture of an inmate's propensity for racial violence in prison; the inmate's attitude outside of prison regarding race may change once incarcerated. The same holds true for transferred inmates as well. The racial make-up or individual inmates of the new prison may cause a previously benign inmate to become potentially dangerous. The CDC cannot accurately gauge an inmate's propensity for racial violence without first observing him in this new environment.

Johnson also never answered how the CDC could accumulate the relevant information needed to make an informed housing decision. As discussed above, inmates are unlikely to be forthcoming regarding their potentially incriminating history of violence, and, thus, the CDC would have to conduct its own independent examination. There is no indication that an independent examination would not be more than a de minimis cost. Without some sort of showing that the CDC could accomplish its goals without incurring a significant cost, Johnson cannot prevail. *Mauro*, 188 F.3d at 1062.

Our decision that the CDC policy is not an "exaggerated response" is reinforced when we look to our Eighth Amendment Cruel and Unusual Punishment Clause jurisprudence. Prison authorities are required under the Eighth Amendment to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825,

832 (1994) (internal citations and quotations omitted); *Harper*, 494 U.S. at 223. *See generally Robinson v. California*, 370 U.S. 660 (1962) (applying the Eighth Amendment's Cruel and Unusual Punishment Clause to the states via the Fourteenth Amendment). In *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001), we held that it was clearly established that such reasonable measures included taking an inmate's race into account when allowing inmates to enter the recreation yards. The court, in denying the prison administrators qualified immunity, held that the inmate's "evidence paints a gladiator-like scenario, in which prison guards are aware that placing inmates of different races in the yard at the same time presents a serious risk of violent outbreaks." 249 F.3d at 868. According to the court, the administrators were not entitled to qualified immunity because the law clearly established that their actions were unlawful. *Id.*

Similarly, the failure to take race into consideration in cell assignments could be considered "deliberate indifference" to prisoners' safety and could itself constitute a constitutional violation. Steven Cambra, the Acting Director of the CDC, noted the risk of personal liability if race were not considered in making housing decisions: "[I]f I just take two inmates and have total disregard for their ethnicity . . . I feel I am putting myself in a position that I could be charged with setting up one of them to be injured." Declaration of Steven Cambra, Acting Director of Corrections, in Support of Defendants' Motion for Summary Judgment, *supra*, at 3. To reduce its liability under the Eighth Amendment and to protect inmates, the CDC crafted a policy, assigning cell mates largely along racial lines for a limited time, so as to

decrease the risk of racial violence that the administrators are aware exists. Certainly, this is a reasonable response in light of the conflicting responsibilities that the CDC must balance.

V

Although there may be many ways in which to achieve the state's objective in reducing racial violence in the CDC, the path chosen by the State of California is reasonably related to the administrators' concern for racial violence and thus must be upheld. If this policy were implemented beyond the prison walls, undoubtedly, we would strike it down as unconstitutional. The prison system, however, is inherently different and we must defer our judgment to that of the prison administrators until presented evidence demonstrating the unreasonableness of the administrators' policy. The Supreme Court has instructed us that inmates bear a "heavy burden" to show that prison officials acted unconstitutionally, and in this case, Johnson failed to carry his burden. He presented little to no evidence and could not rebut the presumption of constitutionality that the administrators are afforded.

Because Johnson failed to prove that a constitutional violation could be made out, we need not reach the ultimate question of whether the CDC administrators are entitled to qualified immunity. *Saucier*, 533 U.S. at 201.

AFFIRMED.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JULY 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

No. CV 95-1192 CBM (BQR)

July 30, 2001

GARRISON S. JOHNSON

v.

STATE OF CALIFORNIA, et al.

* * *

PRESENT

The Honorable Harry L. Hupp, Judge

* * *

PROCEEDINGS: MOTION FOR RECONSIDERATION

ORDER

The motion for reconsideration is granted on the issue of qualified immunity as to defendants James Rowland and James H. Gomez. The action is dismissed as to said

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defendants on the basis of qualified immunity by judgment signed and filed this date.

This matter has been transferred to this court for the decision of this motion only. All further proceedings will be before Judge Marshall.

Defendants Rowland and Gomez seek reconsideration of the denial in this court's order of June 11, 2001, of defendants' motion for summary judgment insofar as it seeks dismissal on the basis of qualified immunity. Reconsideration is sought in view of the decision of the Supreme Court on June 18, 2001, in *Saucier v. Katz* '01 121 SCT 2151, 2001 WL 67265. In the court's opinion, that case demands reconsideration of qualified immunity insofar as it applies to the cases of defendants Rowland and Gomez (but not as to defendant Cambra, against whom only injunctive relief is sought).

The court adheres to its view expressed in the order of 6/11/01 that there is a triable issue of fact on the Equal Protection question as to the policy of the California Department of Corrections (CDC) of initially segregating prisoners at the Inmate Reception Center and on transfer to any new prison on the basis of race. Defendants defended that policy on the basis of prisoner safety, citing substantial danger posed by the existence of mutually hostile race based gangs in the prison population, and on the necessity of taking certain time to analyze the danger on an individual basis to a newly arrived prisoner. This policy may on trial be held to conflict with the non-segregation rule for prisons announced in *Lee* '68 390 US 333, 19 LEd 2d 1212, applying the

standards laid down in *Turner* '87 482 US 78, 96 LEd2d 64. However, whether or not there is ultimately held to be a constitutional violation, qualified immunity for defendants Rowland and Gomez must be reconsidered in light of *Saucier.*

As to whether the law was clearly established in advance of the alleged actions of those defendants, an element of qualified immunity, there must be considered the caveat to the no-segregation rule stated in *Lee*, as follows: ". . . prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." There are few cases applying this caveat in practical prison situations and its application in any particular situation is unclear. *Turner* makes clear that the test is one of deferential review. Applying the law of qualified immunity, the Supreme Court in *Saucier* makes it clear in reversing the Ninth Circuit that if there is any doubt about the clarity of the law, or what is reasonable in the circumstances, the defendant must be dismissed whatever the ultimate ruling on the constitutional principle might be. In this case, Rowland and Gomez were directors of CDC and administered the alleged discriminatory policy. They are sued for damages under § 1983 in their individual capacities. Under the *Lee* caveat quoted above, there is a reasonable argument that the CDC alleged policy does not violate the Equal Protection Clause. *Saucier* makes it clear that qualified immunity is a doctrine which is intended not to make a defendant stand trial even if there is an arguable constitutional violation which may be established against him unless the law is clear that the actions certainly violated the Constitution. While the Ninth Circuit may be argued to have

watered down this doctrine (at least in excessive force cases), it was emphatically corrected in *Saucier*, which this court must recognize and follow. There is no use pointing out that the Supreme Court left trial courts rudderless in how actually to apply qualified immunity where the facts are not undisputed—what the Supreme Court did in *Saucier* is to make it clear that, in effect, when in doubt, qualified immunity must be granted before trial. Sobeit.

The action is dismissed on the basis of qualified immunity as to defendants Rowland and Gomez. Since monetary relief is not requested as to defendant Cambra, he has properly not asked for qualified immunity.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 28, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56436

D.C. No.
CV-95-01192-CBM
Central District of
California,
Los Angeles
ORDER

Filed July 28, 2003

Before: Procter Hug, Jr., Melvin Brunetti, and Diarmuid F. O'Scannlain, Circuit Judges

Order; Dissent by Judge Ferguson

GARRISON S. JOHNSON,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ, DIRECTOR, DEPARTMENT OF CORRECTIONS; JAMES ROWLAND,

Defendants-Appellees.

Appendix C

ORDER

The panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain voted to deny the petition for rehearing en banc, and Judges Hug and Brunetti so recommended.

The full court was advised of the Suggestion for Rehearing En Banc. A judge of this court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.

The Petition and the Suggestion are thus DENIED.

Appendix C

FERGUSON, Circuit Judge, with whom Circuit Judges PREGERSON, D.W. NELSON, and REINHARDT join, dissenting from our court's denial of rehearing en banc.

I respectfully dissent from the order denying rehearing en banc. Over thirty years ago, the Supreme Court sought to end officially sanctioned racial segregation in our prison system by striking down statutes requiring "segregation of the races in prisons and jails" as violating the Fourteenth Amendment. *See Lee v. Washington,* 390 U.S. 333, 334 (1968) (per curiam). The panel's opinion threatens to undo that achievement by altogether removing the burden on prison officials to justify fundamentally suspect policies classifying prisoners on the basis of race. The decision impermissibly construes the Court's decision in *Turner v. Safley,* 482 U.S. 78, 89 (1987), to overrule *Lee,* in the process failing to accord to the Supreme Court the exclusive "prerogative [to] overrul[e] its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989). The panel's decision ignores the Supreme Court's repeated and unequivocal command that "all racial classifications imposed by the government 'must be analyzed by a reviewing court under strict scrutiny.' " *Grutter v. Bollinger,* 123 S. Ct. 2325, 2337 (2003) (quoting *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995)), and fails to recognize that *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological objectives.

Appendix C

I. Strict Scrutiny is the Applicable Standard for All Race-Based Government Classifications, Regardless of the Government Actor

In cases decided both before and after *Turner v. Safley,* the Supreme Court has clearly held that government classifications based on race are, without exception, subject to strict scrutiny. *See id.; see also Adarand,* 515 U.S. at 227; *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989). The purpose of strict scrutiny is to " 'smoke out' illegitimate uses of race by assuring that [a state actor] is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.' " *Adarand,* 515 U.S. at 226 (quoting *Croson,* 488 U.S. at 493). The fact that a racially discriminatory classification scheme has a "benign" or well-intentioned purpose does not relieve a government actor from the burden to justify such a policy. *See id.*

Consistent with the rule requiring strict scrutiny for all government actors, the Court's per curiam decision in *Lee* placed the burden on prison officials to justify segregationist policies, embracing in affirmance the Alabama District Court's rejection of prison officials' argument that "the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts." *Washington v. Lee,* 263 F. Supp. 327, 331 (M.D. Al. 1966); *see also Lee,* 390 U.S. at 334. Although the *Lee* Court acknowledged prisons' continuing need to make "allowance

for the necessities of prison security and discipline," 390 U.S. at 334, *Lee* nevertheless applied heightened scrutiny to the contested regulations, as cases construing *Lee* have made clear. In *Hudson v. Palmer*, for example, the Court cited *Lee* for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be *essential* to 'prison security and discipline.' " 478 U.S. 517, 523 (1984) (quoting *Lee*, 390 U.S. at 334) (emphasis added). More recently, Justice Scalia specifically noted that *Lee's* "necessities" exception is applicable "only [in] a social emergency rising to the level of imminent danger to life and limb . . . [such as] a prison race riot." *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring); *see also Grutter*, 123 S. Ct. at 2352 (Thomas, J., dissenting) (citing *Lee* as "indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination.").

The panel concedes that the Court's decision in *Lee* has direct application in this case, *Johnson v. Rowland*, 321 F.3d 791, 797-98 (2003), but nevertheless determines that *Turner* is controlling. *Id.* at 798. The panel announces, without citing any support for its contention, that *Turner* "was not merely a cosmetic change in the Court's language . . . [it] lowered the prison administrators' burden to justify race-based policies [and placed this 'heavy burden' on] the inmate." *Id.* at 798-99. Implicitly, the panel presumes that *Lee* required a heightened standard, but notes that even if "Johnson is correct that *Lee* would have required actual violence . . . Johnson's argument cannot withstand our consistent application of *Turner*." *Id.* at 801 n. 8.

No Supreme Court case supports the panel's claim that *Turner* applies in the context of suspect-class equal protection claims, let alone that it implicitly overruled *Lee*.[1] In light of *Lee's* directly controlling holding and the Supreme Court's repeated command to apply strict scrutiny to all race-based classifications, the panel simply does not have the authority to interpret *Turner* as requiring a different level of review. "If a precedent of th[e Supreme] Court had direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Ouijas*, 490 U.S. at 484; *see also Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). The panel may not lower the standard that has been clearly articulated in Supreme Court case law in order to allow the policy to survive review.

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1. Even *Washington v. Harper*, 494 U.S. 210, 224 (1990), upon which the panel partially relies, did not suggest that prison officials, in contrast to *all* other government actors, are relieved from the obligation to justify race-based policies by presenting a compelling interest and a narrowly tailored solution. Although *Washington v. Harper* purported to control every subsequent prison case, *see Washington*, 494 U.S. at 224, it cannot do so. "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

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The effect of the panel's dismissal of the relevant Supreme Court case law is to create a dangerous and unwarranted exception to the general rule for prison officials. If military officials acting during wartime are subject to strict scrutiny, *see Toyosaburo Korematsu v. United States,* 323 U.S. 214, 217-18 (1944), then certainly prison officials engaging in the routine performance of their duties should be subject to it as well. Nevertheless, the opinion presumes that prison officials are so uniquely free of the taint of racism that an exception should be created just for them.

Our race-based equal protection jurisprudence does not permit an exception to the strict scrutiny rule. " 'Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' " *Adarand,* 515 U.S. at 226 (quoting *Croson,* 488 U.S. at 493). " '[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate . . . racial classifications are simply too pernicious to permit any but the most exacting connection between justification and classification.' " *Id.* at 236 (quoting *Fullilove v. Klutznick,* 448 U.S. 448,.533-35 (1980) (dissenting opinion)).

Deferring to the alleged "common-sense" of state officials on matters of race is fundamentally at odds with the requirements and purpose of the Fourteenth Amendment. *See Adarand,* 515 U.S. at 228. Yet this is precisely what the panel does by holding that the governmment is "not required

Appendix C

to make any evidentiary connection concerning the connection [between the policy and prison violence]." *Rowland,* 321 F.3d at 803 (quoting *Frost v. Symington,* 197 F.3d 348, 357 (9th Cir. 1999)).[2] Regardless of the potential for abuse, the decision holds that reviewing courts must defer to prison official's "common sense" as to whether there is a legitimate safety concern, and must presume that what prison officials "feel" might happen is actually what will happen.[3]

Under the panel's test, if a prison official were to announce that prisoners could no longer visit with spouses or children of a visibly different race, based on the official's entirely unsupported belief that there would be subsequent racial violence based on the sometimes charged nature of interracial relationships, we would have to shrug our shoulders and defer. The prisoner would have to prove that there would *not* be a riot, which, in a racist society, would simply never be possible. It is certainly "plausible" that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could

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2. Although the panel asserts that "the high level of racial violence in the [prison] is well documented" and that "this is hardly a case where the prison administrators are acting on an unsubstantiated record," *id.* at 801 n. 9, the bulk of the facts the panel presents are, legally speaking, irrelevant; nothing in the decision's holding requires the prison to justify the policy in any real fashion.

3. The prison official affidavits relied on by the panel do not cite one concrete instance or statistical example of racial violence, instead referring only to the unsubstantiated "beliefs" of prison officials about what they presume will happen.

potentially lead to conflict. *See Adarand,* 515 U.S. at 237 ("the unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality."). More to the point, our society, as well as our prisons, contains an abundance of persons who *believe* that *any* cross-racial interaction is dangerous, regardless of whether their beliefs are based in fact.[4]

Both the Fifth and the Seventh Circuits have refused to accord such extreme deference, recognizing that, in the context of race, more must be required. In *Sockwell v. Phelps*, the Fifth Circuit considered and rejected a policy nearly identical to the one put forth by the prison in this case and supported by nearly identical "safety" justifications. *See* 20 F.3d 187, 191-92 (5th Cir. 1994).[5] The *Sockwell* court

4. The panel's assertion that it is patently obvious that the policy makes good "common-sense" is, in fact, belied by studies addressing the question. *See* Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons,* 37 LAW & SOC'Y REV. 743, 774 (2002) (study of inmate-on-inmate assault data which found that "over [ten years], the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated.").

5. In *Sockwell*, Texas prison authorities actually presented more concrete evidence than what was offered in the instant case. In support of their contention that racially segregated two-man cells were needed to increase security, they asserted that:

> (1) prison guards were unable to visually monitor each . . . cell; . . . (3) two instances occurred in which black

(Cont'd)

implicitly rejected *Turner,* placing the burden of proof to justify the policy on prison authorities and refusing to accept the prison authorities' "generalized or vague fear of racial violence [as] a sufficient justification for a broad policy of [residential] racial segregation." 20 F.3d at 191.[6] Similarly, in *Black v. Lane,* 824 F.2d 561, 562 (7th Cir. 1987) (decided subsequent to *Turner*), the Seventh Circuit specifically held that "absent a compelling state interest, racial discrimination in administering prisons violates the Equal Protection Clause." *Id.* (citing *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974)).

Other portions of the panel's analysis reveal just as starkly the trouble with applying *Turner's* reasoning to a race-based equal protection claim. For example, in finding that Johnson has a "reasonable alternative" to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time, the panel

(Cont'd)

> and white prisoners housed together became violent; (4) racial supremacy groups existed within the prison ranks; and (5) interracial conflict may have triggered more generalized racial violence.

20 F.3d at 191.

6. Contrary to the panel's suggestion, *see Johnson v. Rowland,* 321 F.3d at 797 n. 5, the fact that there appeared to be disparate treatment between the cells did not play any role in the *Sockwell* court's analysis. *See* 20 F.3d at 191. Unlike the panel, the *Sockwell* court was not under the illusion that racially discriminatory government policies are acceptable so long as they produce "equal" results. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

essentially asserts that if the state only discriminates sometimes, no harm is done. *See Johnson v. Rowland*, 321 F.3d at 804. This close-enough argument is akin to asserting that if a school-child only has to go to a segregated school one-third of the year, the requirements of *Brown v. Board of Education* are met. As the District of Columbia Circuit stated in *Pitts v. Thornburgh*, the right to be free from discrimination is the right to be free from a particular, definite, constitutional harm, not the right to engage in a particular activity or associate with particular persons. *See* 866 F.2d 1450, 1455 (D.C. Cir. 1989) ("While an equal protection claim . . . is, in one sense, a personal right . . . the claim is also a demand that government action that affects an individual not be predicated upon constitutionally defective reasoning."); *see also Adarand*, 515 U.S. at 229-30.

When it comes to matters of race, the "common-sense" of state officials is frequently the opposite of sensible or rational, and a searching inquiry into the motives and alternatives to the state actor's plan is therefore required. The Fourteenth Amendment simply does not permit any level of review except for strict scrutiny, let alone the excessive deference that the panel applies.

There is little merit to the panel's suggestion that strict scrutiny of race- based policies would unnecessarily limit prison officials' ability to effectively manage prisons or open the floodgates to frivolous litigation. Recognizing that there are unique circumstances under which a race-based classification may be permissible, the Supreme Court has specifically rejected the notion that "strict scrutiny is[ ] 'strict in theory, but fatal in fact.' " *Grutter*, 123 S. Ct. at 2338

(quoting *Adarand*, 515 U.S. at 227). "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context." *Id. Grutter* makes clear that strict scrutiny still allows for a measure of deference to government actors acting within their particular sphere of competence. *Id.* at 2339. However, the "scrutiny of the interest asserted by [government actors] is no less strict for taking into account complex . . . judgments in an area that lies primarily within [their] expertise." *Id.* The burden is squarely on the government to establish both that its interest is compelling and that its means are narrowly tailored.

It is perfectly possible that a prison could develop a race-based policy that would survive strict scrutiny analysis, given the clearly compelling interest in maintaining safety and order in prisons. Indeed, it is possible, even likely, that prison officials could show that the current policy meets the test. Contrary to the panel's suggestion, imposing the burden of justifying such policies on prison administrators is not unduly burdensome, given (I assume) the exceptional rarity of policies that are openly discriminatory. While any review of prison policies requires the court to appreciate the difficulties encountered by prison officials in maintaining a safe environment, *see Pitts*, 866 F.2d at 1455, it is simply not the case that either *Turner* or any other case in the Supreme Court's equal protection jurisprudence permits prisons to engage in racial discrimination without a compelling justification and a showing that the policy is narrowly tailored to meet the alleged safety need.

II. *Turner* Analysis Does Not Control Where, As Here, the Right Asserted Is Not Inconsistent with the Legitimate Objectives of the Penal System

Turner analysis is inapplicable not only because the Supreme Court has clearly stated that strict scrutiny applies in all cases in which the government creates racial classifications, but because the constitutional right at issue is not "inconsistent . . . with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822 (1974). As the Supreme Court's most recent prison case makes clear, a consideration of whether the right at issue is "inconsistent with proper incarceration" is a crucial step in determining whether or not *Turner* analysis applies. *See Overton v. Bazzetta,* 123 S. Ct. 2162, 2167 (2003); *see also Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 125 (1977) (rejecting inmate First Amendment claim where "ban [on solicitation and meetings] . . . was rationally related to the reasonable, indeed to the central, objectives of prison administration."); *Jordan v. Gardner,* 986 F.2d 1521, 1530 (9th Cir. 1993) (rejecting application of *Turner* analysis in context of Eighth Amendment claim).

An individual's right to be free from state imposed racial discrimination cannot plausibly be said to be "inconsistent with the legitimate penological objectives of the corrections system," nor can it be said that a prison official's ability to discriminate between prisoners based on race is "central [to] the objectives of prison administration." Like the Eighth Amendment prohibition of cruel and unusual punishment, the Fourteenth Amendment's ban on invidious state discrimination specifically contemplates a limitation on state

power that is "complementary" to the goals of effective imprisonment. *See Jordan,* 986 F.2d at 1530; *see also Pitts,* 866 F.2d at 1455. For this reason, the right to be free from state-sponsored segregationist policies is qualitatively different from other rights to which *Turner* has been applied. *Cf. Overton,* 123 S. Ct. at 2167 (applying *Turner* to freedom of association claims relating to family visitation); *Shaw v. Murphy,* 532 U.S. 223, 228 (2001) (applying *Turner* to inmate first amendment challenge to prison regulation restricting inmate correspondence); *Washington v. Harper,* 494 U.S. 210, 221-23 (1990) (applying *Turner* in context of due process challenge to involuntary medication of mentally ill prisoner); *O'Lone v. Shabazz,* 482 U.S. 342, 349-50 (1987) (applying *Turner* in case challenging right of prison to limit attendance at particular religious services).

Unlike the rights asserted in previous prison cases, the right to be free from state-sponsored segregation is central to the legitimacy of our system of justice, including the penal system. In the same way that the Eighth Amendment embodies an understanding that the penal system loses legitimacy to the extent that its methods are abhorrent on their face, so too the Fourteenth Amendment acknowledges that government power retains legitimacy in direct proportion to the extent that its objectives are carried out free of the stigma of inequitable or discriminatory classification systems, especially ones based on inherently arbitrary factors like race.

In *Pitts,* the District of Columbia Circuit explicitly rejected the application of *Turner* in the context of a suspect class equal protection claim. *Pitts,* 866 F.2d at 1453. Although the claim involved issues that did "not directly

implicate either prison security or control of inmate behavior," *id.* at 1454, the Court specifically noted that the Supreme Court "has commanded [that suspect classifications] demand[ ] the court's special attention." *Id.* at 1454-55. The *Pitts* court also noted that the fact that an equal protection claim "charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties," was relevant to the level of scrutiny it applied. *Id.* at 1455.

In short, *Turner* analysis is simply not applicable when the right at issue is not only not inconsistent with, but complementary to the needs of effective imprisonment. The panel's failure to recognize this distinction renders an already erroneous decision even more problematic.

* * *

The panel's decision gives *carte blanche* to prison officials to impose their own notions of racial hatred and conflict upon prisoners, regardless of whether these notions are based in fact or deeply-held stereotypes. The decision ignores the applicable standard of review and the primary purpose of the Fourteenth Amendment's prohibition on racial discrimination, which is to limit states' power to create fundamentally suspect racial classification schemes. I therefore dissent from the denial of rehearing en banc.

(2)

No. 03-636

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

GARRISON S. JOHNSON, *Petitioner,*

v.

JAMES GOMEZ and JAMES ROWLAND, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS F OR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state's practice of temporary racial segregation of state prisoners subject to the *Turner v. Safley*, 482 U.S. 78 (1987) test or is it subject to the strict scrutiny standard?

2. Does California's practice of temporary racial segregation of state prisoners violate the Equal Protection Clause?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-636

GARRISON S. JOHNSON, *Petitioner,*

v.

JAMES GOMEZ and JAMES ROWLAND, *Respondents.*

STATEMENT OF THE CASE

This case involves the California Department of Corrections' practice concerning initial cell assignments.

When an inmate arrives at a CDC institution, either as a transfer from another facility or as a new inmate, he is initially housed in a reception center. There, the inmate goes through a classification process during which he is given a battery of tests, interviews, and both physical and mental health exams. He is evaluated for potential violence, security concerns, and possible gang affiliation. (Pet. App. 2a-3a).

Inmates at a reception center are typically double-celled; in other words, they share their cell with a cell-mate. To determine the appropriate double-cell housing placement, the CDC looks at several factors including gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations,

gang affiliation, background, history, custody designation, and race. While at the reception center, inmates are generally housed with an inmate of the same ethnic race. The CDC considers race when making an initial housing assignment because, in its experience, race is very important to inmates and it plays a significant role in antisocial behavior. (*Id.* at 3a.) Housing in a reception center is temporary, typically for 60 days.

An administrator at California State Prison-Lancaster, where Petitioner was housed, testified that if race were not considered in making this initial housing assignment, she was certain that there would be racially based conflict in the cells and in the prison yard. She was unwilling to knowingly disregard racial factors and place an inmate in jeopardy, and would not compromise inmate safety through actions that she knew would result in violence and conflict. This view was unanimously supported by other prison officials. (*Id.* at 4a.)

The rest of the prison's operations are racially integrated, even for inmates going through the initial classification process. There is no distinction based on race as to jobs, meals, yard and recreational time, or vocational and educational assignments. But the confined nature of the cells makes them potentially more dangerous than the other areas of the prison. Staff cannot see into the cells without going up to them, and inmates sometimes place coverings over the windows so that staff cannot see into them at all. Moreover, inmates are confined to their cells for much of the day. Because of the currently high levels of racial violence in areas where inmates are easily observed, the administrators are concerned that they would not be able to protect inmates who are confined in their cells, if they did not consider race as a factor before completion of the evaluation process. Instead, they insist on having 60 days to analyze each inmate individually to

determine whether the inmate poses a danger to others. (*Id.* at 4a.)

After 60 days, the inmate is either permanently assigned a cell at the current institution, or he is transferred to another institution that better suits his particular needs. If the inmate is transferred, he again goes through the initial housing screening process. If the inmate has the required security classification, he may be assigned to a dormitory or a single cell. (*Id.* at 4a-5a.)

Inmates assigned to a dormitory are considered nonviolent, and, thus, inmates of all races are housed together. The CDC does not use race as a factor to determine who is assigned to a dormitory, but within each dormitory it attempts to maintain a racial balance to reduce the likelihood of racial violence. Single-cell housing decisions are made completely independent of race and are based solely on an inmate's violent or predatory behavior. If the inmate remains in a double cell, the CDC's goal is for inmates to select their own cell-mate, so as to maximize the inmates' compatibility and minimize the possibility of violence. There are designated forms that both inmates must sign indicating that they would like to share a cell. Unless there are security reasons for not granting an inmate's request to share a cell with another inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions. (*Id.* at 5a.)

Petitioner Garrison Johnson, an African-American prisoner, alleges that the initial double-cell assignment practice violates the Equal Protection Clause. Petitioner alleges that he has been through inmate reception centers at several prisons and at each one he was double-celled with an inmate of the same ethnicity.

The Ninth Circuit found the CDC's practice was reasonably related to legitimate penological interests and concluded that the prison's temporary housing practice does not violate Petitioner's constitutional rights. The Ninth Circuit determined that prison officials may make initial cell assignments using race as a factor in the housing decision. To reach this conclusion, the Ninth Circuit applied this Court's test set out in *Turner v. Safley*, 482 U.S. 78 (1987).

In *Turner*, this Court articulated a reasonableness test with four factors: (1) whether a valid and rational connection exists between the activity and a legitimate governmental interest advanced as a justification; (2) whether, notwithstanding the prison's policy or practice, alternative means exist for the prisoner to exercise the right; (3) what effect an accommodation of the prisoner's constitutional right would have on guards, inmates, and prison resources; and (4) whether an alternative is available to accommodate the prisoner's rights at a *de minimis* cost to valid penological interests. *Id.* at 89-91.

Turner's first prong requires an examination of whether there was a "valid, rational connection" between the prison action and a legitimate penological interest. *Turner,* 482 U.S. 89-90. Under this prong, the court must determine whether the government objective was neutral and unrelated to racial discrimination. (Pet. App. at 14a.) In this case, the court found that prison administrators used race as a factor in making their initial housing assignments, "solely on the basis of [its] potential implications for prison security . . ." (*Id.* at 15a.) The policy was therefore held neutral within the meaning of *Turner*.

The court then analyzed whether the practice was rationally related to the state's interest, and found that it

was. (*Id.* at 15a-22a.) The court reviewed testimony about the serious, ongoing problems that prison officials face with respect to maintaining security for violent inmates. (Pet. App. 16a n.9.)

The Ninth Circuit has recognized the logical connection between prison gangs and violence. *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996) (acknowledging that those familiar with prisons are aware of the seriousness of the problems caused by prison gangs which are fueled by actively virulent racism and religious bigotry.) And the court's opinion cited numerous other instances of racial violence in California's prison yards. (Pet. App. 17a-18a n.9.)

The court concluded that it was reasonable that prison administrators believe using race as one factor in making an initial housing determination is necessary for inmate and staff safety. The court found that *Turner 's* first prong was met. (*Id.* at 22a.)

The Ninth Circuit examined the second factor under *Turner*, the alternative means test. Where other avenues remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation. *Turner*, 482 U.S. at 90. (Pet. App. 22a-23a.)

The court concluded that alternative means existed for prisoners to exercise their constitutional rights. (*Id.* at 24a.) The rest of the prison is fully integrated. There is no distinction based on race as to jobs, meals, yard and recreational time, or vocational and educational assignments. The classification process is completed within 60 days. (*Id,*) After that, if the inmate remains in a double cell, the CDC's goal is for inmates to select their

own cell- mate, to maximize the inmates' compatibility and to reduce the possibility of violence. Unless there are security reasons for not granting an inmate's request to share a cell with a particular inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions. (*Id.* at 5a.)

Under the third *Turner* factor, the court examined what impact accommodating the inmate's asserted right would have on prison personnel, inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90.

The court deferred to the CDC's assertion that failing to consider race in making initial housing assignments would lead to increased racial violence both in the cells and in the common areas of the prison. (Pet. App. 25a-26a.) The CDC administrators uniformly stated that failing to take race into account in making initial housing decisions would violate their obligations under the Eighth Amendment to protect inmates from a known danger. *Farmer v. Brennan*, 511 U.S. 825, 827, 831 (1994). (Pet. App. 30a.)

The CDC Director stated:

> If race were to be disregarded entirely . . . I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise . . . I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist

> inmates if the staff were needed in several places at one time. (Pet. App. 25a-26a.)

The CDC staff represented that the impact of ignoring race in the initial housing assignment would be significant and the court deferred to the administrators' judgment. (*Id.* at 27a.)

Turner's fourth factor examines whether reasonable alternatives exist which would fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests. *Turner*, 482 U.S. at 91. The Ninth Circuit examined the proposed alternatives and determined that there were no reasonable alternatives that would accommodate Petitioner's interest at *de minimis* cost to valid penological interests. (Pet. App. 27a-29a.)

After examining the *Turner* factors, the Ninth Circuit concluded that the CDC's response was reasonably related to the administrators' concern for racial violence and was properly upheld.

REASONS FOR DENYING THE PETITION

I.

THE PETITION SHOULD BE DENIED BECAUSE, EVEN IF *TURNER v. SAFLEY* WERE NOT APPLICABLE TO CLAIMS OF RACIAL SEGREGATION IN INITIAL CELL ASSIGNMENTS, THE PRISON PRACTICE WOULD SATISFY STRICT SCRUTINY.

Petitioner contends that the standard of review applied by the Ninth Circuit in this equal protection case conflicts with this Court's applicable precedents. Petitioner argues that strict scrutiny applies in this case despite the prison environment. But the Ninth Circuit properly applied the more deferential standard consistent with this Court's decisions concerning inmates.

Since *Turner* was decided, this Court's opinions have emphasized that the *Turner* test applies to prisoners' constitutional claims regardless of the standard of review that would be applied outside prison walls. This principle was repeated in *O'Lone v. Shabazz*, 482 U.S. 344 (1987) which held, "To ensure that courts afford appropriate deference to prison officials . . . prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id*. at 349. And in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court found that even when strict scrutiny otherwise would apply to the policy in question, the exigencies of prison administration require only that the regulations be reasonably related to a

only that the regulations be reasonably related to a legitimate penological interest. *Id*. at 407–09, 412.

In *Washington v. Harper*, 494 U.S. 210 (1990), the Court was faced with a prisoner's Fourteenth Amendment due process claim and reaffirmed its intent that *Turner* be followed, declaring "we made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id*. at 223–24.

Petitioner argues that all state racial segregation claims are subject to strict scrutiny regardless of whether they are in the prison context. To support this, he refers to *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Construction, Inc. v. Pena*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

However, Petitioner's conclusion cannot be drawn from these cases because none of them involved the prison environment. None of them required the Court to balance the constitutional claim against the issues of prison management in furtherance of penological interests. Further, none of these cases even implied that *Turner* be disregarded in an equal protection analysis. Indeed, Petitioner's present position was specifically rejected in *Turner*:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that

> some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

Turner, 482 U.S. at 89, *quoting Procunier v. Martinez*, 416 U.S. 369, 407 (1974).

Thus, by applying *Turner*, the Ninth Circuit used the correct standard of review to evaluate Petitioner's equal protection claim.

Moreover, even if the Court concluded that *Turner v. Safley* was not applicable to claims of racial segregation in cell assignments, the prison's practice would still satisfy strict scrutiny as it is narrowly drawn to serve a compelling state interest. *Grutter v. Bollinger*, 123 S. Ct. at 2337.

The classification process at issue is temporary and completed within 60 days. After that, to minimize potential violence, the inmate is encouraged to select a cellmate with whom he is compatible. The high level of racial violence in the CDC is well documented, and administrators must take appropriate steps to rectify or to reduce further violence, which they have done. The purpose of the temporary race-based cell assignment is to ensure the safety of both Petitioner and his cell-mates.

Finally, there is no disadvantage to the prisoner during this classification process. There is no claim of disparate treatment because none exists. The prison facilities are fully integrated. There is no distinction based on race as to jobs, meals, yard and recreational time, or vocational

and educational assignments.

Thus, even if a strict scrutiny analysis were to be applied, the CDC's practice during the temporary classification period would be upheld because it is narrowly drawn to serve the compelling state interest in reducing prison violence.

II.

THERE IS NO CONFLICT WITHIN THE FEDERAL CIRCUITS THAT WARRANTS REVIEW.

Petitioner argues that the Ninth Circuit's decision conflicts with the decisions of the Fifth, Seventh, Eighth and District of Columbia circuit courts, as to which constitutional standard of review should apply and that this warrants review.

Petitioner cites *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994), in which the plaintiff class alleged that the prison was violating a consent decree. Unlike this case, the prisoners claimed disparate treatment. Specifically, they claimed that "white cells" received preferential treatment to "black cells," including first access to showers, better telephones and store privileges, and better views of the television. *Id.* at 190. Here, Petitioner makes no claim that African-American inmates received unfavorable cell locations or disparate treatment. Moreover, *Sockwell* does not discuss any particular standard of review for plaintiffs' claim.

Petitioner also refers to *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). That court held that where gender discrimination is based on a facial classification, heightened scrutiny remains the appropriate standard of constitutional review, despite *Turner*. *Id.* at 1453-55. But although *Pitts* was decided after *Turner*, it was decided before the Court's clarifying opinions in both *Thornburgh,* 490 U.S. 401 and *Washington v. Harper,* 494 U.S. at 223-24. Moreover, *Pitts* did not involve prison security or day-to-day prison management concerns.

Petitioner refers to *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987). That case was decided only a few days after *Turner* and failed to include any discussion of *Turner* at all. As with *Pitts*, Seventh Circuit cases after *Turner* clarified that *Turner* established a broad rule to be applied to all cases implicating constitutional rights. *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988); *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987).

Finally, Petitioner references *Pargo v. Elliott*, 49 F.3d 1355, 1356–57 (8th Cir. 1995). The Eighth Circuit has since ruled that *Turner* applies in the prison environment and courts must balance the right of the inmate against a state's interest in prison safety and security. *Goff v. Harper*, 235 F.3d 410, 413 (8th Cir. 2000).

The *Turner* analysis applied by the Ninth Circuit in this case is the same analysis applied by another circuit court addressing a similar issue. In *Morrison v. Garraghty*, 239 F.3d 648, 654-55 (4th Cir. 2001), the Fourth Circuit used the *Turner* standard to evaluate a prisoner's equal protection claim based on racial discrimination.

The circuit courts do not conflict concerning whether *Turner v. Safley* applies to equal protection claims in prison cases. The petition for writ of certiorari should be denied.

CONCLUSION

This Court should deny the petition for certiorari because the Ninth Circuit's decision is consistent with this Court's precedent and there is no conflict among the circuits.

Dated: January 27, 2004

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(3)

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IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondents do not dispute – because they cannot – that this case squarely presents two important questions regarding the scope of the Equal Protection Clause's prohibition against state-imposed racial segregation. Respondents' only substantive argument – that no split of authority exists among federal circuit courts with respect to the application of *Turner v. Safley*, 482 U.S. 78 (1987), to invidious racial classifications in prisons – lacks merit. The Ninth Circuit's ruling that *Turner* permits explicit racial classifications to evade strict scrutiny review if, and only if, they apply to prisoners is in direct conflict with decisions of the Fifth, Seventh, Eighth, and District of Columbia Circuits, *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995); *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994); *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987), and is irreconcilable with this Court's longstanding and recently reaffirmed jurisprudence that *all* intentional state racial segregation is subject to strict scrutiny when challenged under the Fourteenth Amendment. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Lee v. Washington*, 390 U.S. 333 (1968).

Review is essential to clarify whether explicit government racial classifications may evade strict scrutiny so long as those classified reside in jails and prisons.

ARGUMENT

I. Review Would Resolve A Clear Conflict Among The Circuits.

Respondents' assertion that the "circuit courts do not conflict concerning whether *Turner v. Safley* applies to equal protection claims in prison cases" (Opp. at 13) is simply wrong. The Ninth Circuit's decision directly conflicts with decisions of the Fifth, Seventh, Eighth, and District of Columbia Circuits. *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995); *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994); *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987).

With respect to the Fifth Circuit, Respondents assert an absence of conflict based on the mistaken claim that *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994), does not discuss any particular standard of review for an equal protection claim based on racial segregation of double cells. (Opp. at 12.) To the contrary, *Sockwell* explicitly applied the strict scrutiny standard of *Lee v. Washington*, 390 U.S. 333 (1968) – the very standard rejected by the Ninth Circuit below. *Compare Sockwell*, 20 F.3d at 191-92, *with* App. at 8a-11a. *Sockwell* is in direct conflict with the Ninth Circuit's decision.

Respondents also assert that *Sockwell* creates no circuit split because that case involved allegations of disparate treatment based on race. In *Sockwell*, as here, prisoners claimed their constitutional rights were violated by the prison authorities' racial segregation of two-man cells. 20 F.3d at 189. The prisoners in *Sockwell* also alleged that white prisoners in two-man cells received preferential treatment over black prisoners, *id.* at 190, but the court's holding that

the prisoners' right to equal protection was violated by the racial segregation of cells did not depend on those allegations. *Id.* at 191-92. Moreover, Respondents' suggestion that the facially discriminatory racial classification in *Sockwell* would not have been subject to strict scrutiny if it had been applied equally to all races or ethnicities was discredited long ago in *Loving v. Virginia*, 388 U.S. 1 (1967). When dealing with laws "containing racial classifications, . . . the fact of equal application does not immunize the [law] from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state [laws] drawn according to race." *Id.* at 9.

As to the Seventh Circuit, Respondents fail in their effort to argue that *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987), another case in which a circuit court applied strict scrutiny to policies or practices of prison racial segregation, does not conflict with the decision below. Respondents mischaracterize subsequent Seventh Circuit cases as determining that *Turner* should apply in all cases that implicate constitutional rights. To the contrary, the rulings in both *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987), and *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988), cited by Respondents, are narrow and do not undercut the holding in *Black*. Neither case involved any equal protection claims based on a suspect classification. Both cases involved claims that prison officials violated inmates' First Amendment rights by restricting their religious practices.[1]

1. Although inmate Reed claimed that a policy forbidding inmates to wear long hair discriminated against black Rastafarians in favor of American Indians, against whom the hair-length regulation was not enforced, the prison policy considered in *Reed* was facially race-neutral. *Reed* thus sheds no light on the applicability of *Turner* to prison policies that classify based on race. Further, *Reed* and *Hadi* involved prison regulation based on practices, rather than on the immutable *identity* of the inmate.

Similarly, Respondents fail to persuade that the Eighth Circuit, in *Goff v. Harper*, 235 F.3d 410 (8th Cir. 2000), somehow retreated from its prior holding, in *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995), that the heightened scrutiny traditionally given gender-based equal protection claims applies to such claims in prisons. *Goff* applied the *Turner* standard of review to inmates' claims of violations of their Eighth Amendment right against cruel and unusual punishment and their Fourteenth Amendment right to substantive due process. *Goff*, 235 F.3d at 412. While the court acknowledged that the "*Turner* test should be applied outside First Amendment cases" to the Eighth Amendment and due process claims, it never held that *Turner* would apply to cases ordinarily accorded heightened scrutiny under the Equal Protection Clause. The Eighth Circuit thereby did not disturb either *Pargo* or the holdings of its district courts that strict scrutiny applies to prison racial classifications.[2] The Eighth Circuit remains in conflict with the Ninth as to whether *Turner* should be applied to examine the use by government of suspect classifications in prisons.

Finally, with respect to the District of Columbia Circuit, Respondents mistakenly rely on *Thornburgh v. Abbott*, 490 U.S. 401 (1989), and *Washington v. Harper*, 494 U.S. 210 (1990), in an attempt to limit the relevance of *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), which held that heightened scrutiny applies, notwithstanding *Turner*, in cases

2. *See Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999) (strict scrutiny applied to examine claim that prison officials used race as a primary factor for making housing assignments); *accord Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993) ("Racial discrimination in the administration of prisons violates the [E]qual [P]rotection [C]lause, unless it is justified by a compelling state interest.") (citing *Black v. Lane*, 824 F.2d at 562).

involving gender-based discrimination by prison officials. Unlike *Pitts*, neither *Harper* nor *Abbott* involved suspect classifications based on race or gender. In *Harper*, the Court applied *Turner* to a substantive due process claim related to forced administration of anti-psychotic drugs. *Harper*, 494 U.S. at 213, 223. In *Abbott*, the Court applied *Turner* to a First Amendment claim of prison censorship. *Abbott*, 490 U.S. at 403-04.

The court of appeals in *Pitts* expressly considered and rejected *Turner's* application to suspect classifications on the basis of gender in the prison context. *Pitts*, 866 F.2d at 1453-55. That court's holding that heightened scrutiny remains the appropriate standard when analyzing facial gender classification, even after *Turner*, has not been overruled.[3]

II. The Ninth Circuit's Decision Conflicts With This Court's Decisions.

Respondents do not and cannot refute this Court's longstanding jurisprudence holding that *all* governmental racial classifications are subject to strict scrutiny, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), including racial segregation by state prison authorities. *Lee v. Washington*, 390 U.S. 333 (1968).

3. Respondents suggest that *Pitts* does not create a circuit split because it did not involve prison security or day-to-day management concerns. (Opp. at 12.) However, the court in *Pitts* based its decision not only on the fact that the challenged prison practices involved budgetary policy choices, but also, significantly, on the fact that the case touched upon the very "concerns the Court has clearly held call for stepped-up scrutiny." *Pitts*, 866 F.2d at 1454.

While *Grutter*, *Gratz*, *Adarand*, and *Croson* did not involve the prison environment, Respondents do not and cannot explain how the broad conclusions of those cases that *all* governmental racial classifications are subject to strict scrutiny can be reconciled with the Ninth Circuit's holding. Nor can Respondents explain away the Court's holding in *Lee* expressly invalidating racial segregation in the prison context.

Review is warranted to clarify that this Court's application of strict scrutiny to invidious racial classifications finds no exception where those classified reside in jails and prisons.

III. The CDC's Racial-Segregation Policy Has Not Faced – And Would Not Survive – Strict Scrutiny.

Respondents' argument that review is unnecessary because the California Department of Corrections' (CDC) policy of racial segregation would survive strict scrutiny is belied by the Ninth Circuit's opinion, which plainly found the standard of review outcome-determinative. (*See* App. at 11a.) After distinguishing this case from those in which other courts applied strict scrutiny, the Ninth Circuit noted that, "in a close case such as the one at hand, . . . the standard of review is paramount." (App. at 11a.) In fact, the Ninth Circuit panel went to some lengths to *avoid* applying *Lee*'s heightened standard of review. (*See* App. 8a-11a.) There is no support whatever for Respondents' contention that the CDC's policy would survive strict scrutiny.

Because the Ninth Circuit subjected the CDC's policy of routine racial segregation only to the deferential *Turner* standard of review, the court did not search for the narrow tailoring usually required on judicial review of state racial

classifications. Had the Ninth Circuit attempted to apply strict scrutiny, the CDC's policy would have failed as a result of, among other things, (i) the state's use of race as a proxy for the acknowledged problem of gang-affiliation (Opp. at 5); (ii) automatic re-segregation of prisoners upon their transfer to a different institution (Opp. at 1, 3; App. at 2a); and (iii) blanket application of racial segregation to every inmate, regardless of individual characteristics or necessities (Opp. at 1; App. at 2a-3a).

CONCLUSION

"Separate but equal" has no place in twenty-first century America, even in our nation's prisons. For the reasons set forth in the petition and in this reply, Petitioner respectfully requests that the Supreme Court grant a writ of certiorari and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

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STATE OF CALIFORNIA, et al.,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE AND INTEREST OF AMICUS CURIAE

Pursuant to this Court's Rule 37, Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of neither party.[1] Consent for the filing of this brief has been granted by counsel for Petitioner, and has been lodged with the Clerk of this Court. Respondents, State of California, *et al.*, have withheld consent, necessitating the filing of this motion.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in litigation in matters affecting the public interest. For thirty years, PLF has litigated, both directly and as amicus curiae, in both state and federal courts in numerous cases involving racial discrimination by the government. PLF has participated before this Court in such cases as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

PLF considers this case to be of special significance in that it concerns the government's authority to discriminate between individuals on the basis of race. Although it supports neither party, PLF believes that its extensive experience in cases involving racial discrimination, and the purpose and meaning of the Equal Protection Clause, will assist the Court in applying the proper level of scrutiny to the California policy of separating newly arrived prison inmates by race. Specifically, PLF will argue that the policy must be subjected to strict, non-deferential scrutiny, if the Equal Protection Clause is effectively

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

to protect Americans from racial discrimination, and therefore that the California prison segregation policy must be narrowly tailored to advance a compelling government interest. PLF takes no position, however, on whether the policy actually satisfies strict scrutiny.

In recent years, courts have begun deferring to the decisions of administrators and policy makers, even while claiming to apply strict scrutiny. But history—as well as recent experience—reveals that deferring in the context of strict scrutiny allows invidious racial discrimination to proliferate in spite of the clear command of the Constitution that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This amicus brief will argue that the Court should apply the most rigid scrutiny to the California prison policy, and not defer to the expertise of, or the burdens on, administrators or policy makers. Amicus Pacific Legal Foundation believes it can add insight as to why it is important for this Court to clarify and uphold the nondeferential requirements of strict scrutiny, and respectfully requests that this motion to file a brief amicus curiae be *granted*.

DATED: May, 2004.

Respectfully submitted,

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QUESTION PRESENTED

1. Is a state's practice of routine racial segregation of incoming prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded by *Turner v. Safley*, 482 U.S. 78 (1987)?

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court long ago declared that when government discriminates between people on the basis of race, its decisions are subject to the most exacting judicial scrutiny. *Korematsu v. United States*, 323 U.S. 214 (1944). This country's sad history of government-sponsored racial discrimination and oppression demands that courts carefully review discriminatory state policies. The fact that the Equal Protection Clause was adopted precisely to bar government from engaging in such discrimination—and the fact that even where discriminatory policies are well intended, they can easily be abused—also underline the need for strict scrutiny.

Ironically, the same case that established the strict scrutiny standard, *Korematsu*, did not actually apply strict scrutiny, but instead deferred to the judgment of military commanders who decided to forcibly remove thousands of American citizens of Japanese descent to military detention centers. As this Court has noted, the application of deference in the midst of its allegedly strict scrutiny analysis allowed racial bigotry to evade the *Korematsu* Court's vigilance. That case vividly demonstrates that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995).

Unfortunately, recent years have revealed a disturbing trend away from genuine strict scrutiny analysis. In some cases, this and other courts have again begun to defer to the expertise of government administrators, or have deferred to their decisions out of a desire not to impose greater burdens on them. Such deference is appropriate in most cases, where administrators are acting within their workaday duties, which courts lack the expertise to supervise. But where, as here, administrators are engaged purely in overt racial discrimination, their actions must be reviewed under strict scrutiny.

Deference is incompatible with strict scrutiny analysis, and threatens the effectiveness of strict scrutiny as a mechanism for protecting individual rights and equal treatment. If the strict scrutiny standard is to continue to exert force—if it is not to become the sort of veritable blank check that "rational basis" stands for today—the Court must not permit this trend to continue.

This is not to say that the California policy necessarily violates of the Equal Protection Clause. In fact, Amicus Pacific Legal Foundation takes no position on whether the policy at issue *satisfies* the strict scrutiny standard. Cases have held that race-conscious policies satisfy this standard if they are sufficiently "limited in time." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2346 (2003). The California policy only separates prisoners by race for 60 days, which might therefore satisfy strict scrutiny. On the other hand, other cases suggest that prison segregation policies must take account of particularized circumstances, which would suggest that the California policy is not sufficiently narrowly tailored. *See Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994).

In either case, however, the California policy is racially discriminatory and must be examined under strict scrutiny. This case presents the Court a clear opportunity to declare that *Adarand*'s holding, that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," 515 U.S. at 227, applies to racial discrimination in the context of prison regulations, despite the more deferential standard generally applied to prison regulations under *Turner v. Safley*, 482 U.S. 78 (1987). And it presents the Court with an opportunity to declare that strict scrutiny simply does not entail judicial deference.

ARGUMENT

I

STRICT SCRUTINY IS THE CORRECT APPROACH TO THE CONSTITUTIONAL PROBLEM OF RACIAL DISCRIMINATION IN THIS COUNTRY

Sixty years ago, this Court adopted strict scrutiny as its method of analyzing racial discrimination by the government. *Korematsu*, *supra*. It did so in part because of this nation's sorrowful history of racial discrimination and oppression, and in part because of the clear purpose of the Fourteenth Amendment's Equal Protection Clause: to end racial discrimination by the government in all walks of life. It is vital that this Court take and maintain a strong and consistent position that racial discrimination by the government is tolerable only in the rarest possible circumstances. Understanding that position requires a brief review of the history and purposes of the strict scrutiny standard.

A. This Court Adopted Strict Scrutiny to Put an End to Long-Standing Racial Abuses

Although the United States was founded on the principle that "all men are created equal," Declaration of Independence, 1 Stat. 1 (1776), it has a long history of racial violence and discrimination. The details of this troubling past have been described at length elsewhere. *See, e.g., Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 545-55 (2000). Suffice to say that no subject has divided this country more severely than race, and particularly, "the tragic legacy of government-sanctioned discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).

With the ratification of the Fourteenth Amendment, the power of states to discriminate on the basis of race was

eliminated. It "nullifies and makes void all state legislation, and state action of every kind, which . . . denies to any of [the people] the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *see also Strauder v. West Virginia*, 100 U.S. 303 (1879). The Equal Protection Clause was written to make good on what Martin Luther King, Jr., called the "promissory note" of the Declaration of Independence. Martin Luther King, Jr., *I Have A Dream, reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 217 (J. Washington ed. 1986).

Although the Court allowed state racial discrimination to continue under the "separate but equal" doctrine in *Plessy, supra*, that doctrine became increasingly untenable to the Court. In a series of cases in the first half of the twentieth century, the Court placed heavier limits on government's power to discriminate. *See* John E. Nowak, et al., *Constitutional Law* 551-56 (1978).

In the meantime, however, the Court was adopting an increasingly deferential theory of judicial review. Some justices had long advocated an extreme degree of deference toward the Legislature. *See, e.g., Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ."); *Truax v. Corrigan*, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting) ("[I]in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society."). Gradually, this deference came to prevail. *See, e.g., Buck v. Bell*, 274 U.S. 200, 207 (1927) (deferring to Legislature's decision to "prevent those who are manifestly unfit from continuing their kind."); *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) ("the police power . . . may be put forth in aid of what is . . . held by the prevailing

morality or strong and preponderant opinion to be greatly and immediately necessary . . . .").

In the 1930s, the Court decisively adopted a general rule of "extreme deference to the other branches of government." Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 161 (1984). It did this in part by embracing a presumption that legislation was constitutional, and requiring anyone challenging a law to meet a practically impossible burden by proving that the law cannot be constitutional. *See, e.g., Nebbia v. People of New York*, 291 U.S. 502, 537-38 (1934) ("the Legislature is primarily the judge of the necessity of such an enactment . . . [and] every possible presumption is in favor of its validity . . . ."); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("Even in the absence of [evidence], the existence of facts supporting the legislative judgment is to be presumed . . . .")

Some legal observers became concerned that this tendency to defer to the Legislature was going too far. Roscoe Pound, for instance, had initially endorsed this trend, but became increasingly concerned that deference was leading to the "disappearance of law because it is superseded by an omnicompetent administration," Roscoe Pound, *Contemporary Juristic Theory* 18 (1940), and the "revival of absolute government." *Id.* at 1. Thurgood Marshall, too, expressed concern that "[w]ith the appointment of what has become popularly known as the 'Roosevelt Court,' this weapon [of judicial review under the Due Process Clause] was laid aside . . . ." *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws* (1951), *reprinted in Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences* 117 (Mark V. Tushnet ed. 2001). This was worrisome because the most important role of judicial review is "to guard the Constitution and the rights of individuals from the effects of . . . ill humors . . . [which can cause] serious

oppressions of the minor party in the community." *The Federalist No.* 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). An overly deferential standard of review would be "tantamount to no review at all," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in judgment), and would effectively eliminate any protection of minorities against majority overreaching. Given the ubiquitousness of racial discrimination, the primary victims of an overly deferential standard of review, would be racial minorities.

Partly in response to this concern, in 1938, the Court hinted that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation [is motivated by] . . . prejudice against discrete and insular minorities . . . ." *Carolene Products*, 304 U.S. at 153 n.4. In the years following, the Court became increasingly willing to strike down racially discriminatory laws and practices. Thurgood Marshall and others welcomed this "change in trend" whereby "the Court has begun to look upon the protection of personal liberty as one of its primary functions." Tushnet, *supra* at 117.

In *Korematsu*, this Court expressed its concern with racial discrimination by developing the standard of "strict scrutiny":

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

323 U.S. at 216.

Korematsu shifted the burden of justifying racial discrimination onto the government. *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964). This marked an intentional

withdrawal from the extreme deference of the decades before. But it was spurred by recognition that deference even to government officials who are experts can lead to unfair and unequal results.

It should be emphasized that this scrutiny focused on "specific [discriminatory] outcomes of the established political process" rather than on "institutional competence." Laurence Tribe, *American Constitutional Law* 1452-53 (2d ed. 1988). Focusing on the outcomes, that is, the purpose and effect of government action, and whether the "public necessity" *really is* "pressing"—rather than focusing on the expertise of, or the burdens on, government institutions, is vital to preventing unfair or pretextual discrimination. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be . . . impartial in appearance, yet, if it is applied and administered . . . with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations . . . the denial of equal justice is still within the prohibition of the Constitution.").

B. The Strict Scrutiny Standard Is Appropriate In *All* Circumstances Where Government Is Discriminating on the Basis of Race

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), this Court held that

> "a free people whose institutions are founded upon the doctrine of equality" should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly . . . all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.

The insidious nature of racial discrimination, and the clear intent of the Equal Protection Clause, both counsel for the strictest standard in such cases, "to distinguish legitimate from

illegitimate uses of race in governmental decisionmaking." *Id.* at 228. The Court explained that a nondeferential standard of review was necessary:

> "[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful . . . the reasons for any such classification [must] be clearly identified and unquestionably legitimate," and . . . "the most exact connection [must exist] between justification and classification." [R]equiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, *both as to ends and as to means* . . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

Id. at 236 (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534-535 (1980) (Stevens, J., dissenting)).

The Court therefore focused its attention on the ends and means of the law, rather than on the expertise of, or the burden on, government agents. There are two primary reasons for this. First, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). The Court must therefore focus on the "ends and means" of a challenged policy even where that policy might seem facially neutral. *Yick Wo*, 118 U.S. at 373-74. Were the Court to evaluate a race-based classification by deferring to government administrators, either because of their greater regulatory expertise or out of a hesitation to add to the difficulty of their jobs, it would be unable to prevent pretextual uses of race. "[U]nbounded

discretion carries with it grave potential for abuse." *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, Stevens, Ginsburg, Breyer, JJ., dissenting).

Second, a nondeferential standard like strict scrutiny is warranted because the right to equal treatment is important enough to justify imposing extra burdens on government agents. For instance, in the cases enforcing its decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), this Court repeatedly rejected appeals by school boards and other administrators who tried to delay desegregation purportedly to prevent civil disorder or strain on schools. *See, e.g., Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 290 (1970) (immediate desegregation required regardless of burden on government administrators); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (same). *See also Rhem v. Malcolm*, 527 F.2d 1041, 1043-44 (2d Cir. 1975) (per curiam) ("[A]n individual's constitutional rights may not be sacrificed on the ground that the city has other and more pressing priorities.") As this Court has insisted,

> [p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

Nor does the fact that eliminating racial discrimination might increase the burden on government officials absolve them of the duty to treat people equally. *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) ("[V]indication of conceded constitutional rights cannot be made dependent upon any theory

that it is less expensive to deny than to afford them."); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 234 (1964) (refusing to permit delays in desegregation); *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968) (same). *Cf. Bounds v. Smith*, 430 U.S. 817, 824 (1977) ("[O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts.").

The expertise of government agents is not grounds for deference in cases involving the most important constitutional guarantees. In *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979), a case challenging broadcasting regulations on Free Speech grounds, the Fifth Circuit noted that "[j]udicial deference to agency . . . decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment." The same is true of the Fourteenth Amendment.

Several cases have established that deferring to prison regulations is inappropriate where those regulations threaten constitutional rights. *See, e.g., Johnson v. Avery*, 393 U.S. 483, 486 (1969) ("[D]iscipline and administration of state detention facilities are state functions . . . subject to federal authority only where paramount federal constitutional or statutory rights supervene. [I]n instances where state regulations applicable to inmates . . . conflict with such rights, the regulations may be invalidated."); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974) ("[I]f the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the federal Constitution."); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) ("We are not convinced contrarily by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation."); *McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir. 1972) ("[W]e are reluctant to interfere with the

operation of correctional institutions . . . [but the Constitution] compel[s] an end to this official policy of racial segregation. If disruptions . . . occur . . . administrators [must] take appropriate action against the offending inmates, black or white.").

Since the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States," *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967), it is inappropriate for the Court to defer to the judgment of government administrators who discriminate.

In short, "it is the character of the right, not of the limitation, which determines what standard [of review] governs . . . ." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (citing *Carolene Products*, 304 U.S. at 153 n.4). The history of racial discrimination and the clear command of the Equal Protection Clause counsel strongly in favor of a strict, nondeferential scrutiny focusing on the ends and means of government activity, whenever it discriminates on the basis of race.

II

DEFERRING TO THE EXPERTISE OF GOVERNMENT POLICYMAKERS WOULD UNRAVEL STRICT SCRUTINY IN THE ENTIRE FIELD OF EQUAL PROTECTION LAW

A. *Grutter's* Deferential Standard Threatens Strict Scrutiny

In *Grutter v. Bollinger*, 123 S. Ct. at 2337, this Court reiterated that strict scrutiny applies to all racial discrimination imposed by government. Unfortunately, the Court went on to defer to the expertise of the administrators who devised the discriminatory admissions plan at issue in that case. *See id.* at 2339, 2341. The contradictory nature of this strict scrutiny-plus-deference rule was pointed out by the dissenters and by commentators. *See, e.g., id.* at 2371 (Kennedy, J., dissenting)

("The majority today refuses to be faithful to the settled principle of strict review [for all racial classifications]."); *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 734 n.6 (2003) (Thomas and Scalia, JJ., concurring in part and dissenting in part) ("The joint opinion continues yet another disturbing trend: the application of a complaisant level of scrutiny under the guise of 'strict scrutiny.' *See Grutter* . . . ."); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 105 (Cal. 2004) (Brown, J., dissenting) ("Strict scrutiny is not what it once was. Described in the past as 'strict in theory and fatal in fact,' it has mellowed in recent decades (*see, e.g., Grutter* . . . .)" (citation omitted). *See also* Libby Huskey, Note, *Affirmative Action in Higher Education: Strict in Theory, Intermediate in Fact?*, 4 Wyo. L. Rev. 439, 442 (2004) ("[A]ltering the strict scrutiny analysis in this manner served to confuse the decision and undermine the well-established strict scrutiny test."); Jerry R. Parkinson, *Admissions After* Grutter, 35 U. Tol. L. Rev. 159, 159 (2003) (expressing "surprise[ ] and disappoint[ment] . . . by the extraordinary deference the Court granted . . . despite supposedly applying a strict scrutiny standard . . . .").

Such deference threatens to undermine strict scrutiny analysis. Under strict scrutiny, a law is presumed unconstitutional, and it is the government's duty to rebut that presumption. *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest."); *Accord, Burson v. Freeman*, 504 U.S. 191, 198 (1992). Deference is incompatible with strict scrutiny analysis because the whole point of strict scrutiny, especially in cases involving racial discrimination, is to shift the burden of proof onto the government. *See* Robert Carter and Thurgood Marshall, *The Meaning and Significance of the Supreme Court Decree* (1955), *reprinted in* Tushnet, *supra*, at 160 (praising *Brown v. Bd. of Educ.* for its "important shifting" of the burden of proof onto

government). But to defer to the judgment of government officials when they implement a racially discriminatory program threatens to shift the burden in the government's favor. *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 124 S. Ct. 556, 560-61 (2003) (Scalia, J., and Rehnquist, C.J., dissenting from denial of certiorari) ("If the evidence relied upon by governmental units to justify their use of racial classifications can be as inconclusive as Denver's evidence in this case, our former insistence upon a 'strong basis in evidence' has been abandoned, to be replaced by what amounts to an 'apparent-good-faith' requirement . . . .").

The fundamental weakness in *Grutter* is revealed by comparing it with *Korematsu*. Although the *Korematsu* Court purportedly applied strict scrutiny to the racial classification at issue, it actually *deferred* to the judgment of military officials. *See, e.g.*, 323 U.S. at 218 ("'we cannot reject as unfounded the judgment of the military authorities and of Congress'" (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943))). The Court engaged in a minimal review of the record, *see* 323 U.S. at 219, and then refused to second-guess the determination of "the properly constituted military authorities" that interment of Japanese-Americans was an appropriate policy measure. *Id.* at 223-24.

By deferring to administrative judgment—despite its invocation of strict scrutiny—the *Korematsu* Court upheld a racially discriminatory program. As Justice O'Connor later explained in her opinion for the Court in *Adarand*, 515 U.S. at 236, "*Korematsu* demonstrates vividly that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification . . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." Unfortunately, like *Korematsu*, *Grutter* also retreated from searching inquiry, by choosing to defer to the judgment of the University of Michigan's administrators. This Court should not add to the erosion of

strict scrutiny by deferring to prison officials while claiming to apply strict scrutiny. Doing so would not only further confuse the method of varying standards of scrutiny, but would also lead to unwarranted expansion of government discrimination based on race.

B. Deference to the Expertise Of, or Burdens On, Government Agents Will Undermine the Fundamental Purposes of Strict Scrutiny

Under a system of *stare decisis*, courts must take care to ensure that the principle adopted in a particular case is drawn narrowly enough to avoid applying to inappropriate situations. If the Court adopts a vague rationale for its holding, later courts might too easily find that this rationale justifies far more extreme outcomes than the Court originally anticipated. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1066 (2003) ("If *A* sets a precedent that embodies justification *J*, then lower courts in future cases may feel legally bound to apply *J* as well.").

The use of deference in *Grutter* threatens to become an example of this slippery slope mechanism. In that case, the Court "defer[red to t]he Law School's assessment that diversity will, in fact, yield educational benefits" for students. 123 S. Ct. at 2339. This would seem to limit the rationale of *Grutter* to educational institutions. Yet in the short time since *Grutter* was announced, lower courts have relied on it to uphold a number of racially discriminatory policies. In *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003), the Eighth Circuit invoked *Grutter* to uphold racial discrimination in public works contracts. In *Berkley v. United States*, 59 Fed. Cl. 675, 683 (2004), the Court of Federal Claims suggested that *Grutter* would permit deference to racial discrimination by the military.

In *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 1424 (Apr. 19, 2004) (No. 03-1458), the Seventh Circuit Court of Appeals relied on *Grutter* to permit racial preferences in promoting police officers. Because *Grutter* "deferred to the law school's educational judgment" in creating racial preferences, *id.* at 1114, the Court of Appeals held that it was "[s]imilarly . . . proper in this case to rely on the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the [police department]." *Id.*

Deference already has begun to unravel the strict scrutiny standard[2] and lead to the expansion of racial discrimination by government. If this Court is to maintain the effectiveness of the strict scrutiny standard, it must restrain the deference which that case applied to cases involving government racial discrimination.

C. Although Appropriate to a Limited Degree, Deference to Nonjudicial Branches Threatens to Undermine Judicial Review

Courts defer to nonjudicial branches for several reasons. First, courts are rarely in a position to assess all of the competing interests that political branches consider when devising policy. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973). Second, judicial intervention would risk transferring the Legislature's power to create policy to unaccountable federal courts. *Raines v. Byrd*, 521 U.S. 811, 828-29 (1997). Third, in many ways, the Constitution was written to accomplish purposes "principally [through] the workings of the . . . Government itself, rather than in discrete limitations on the objects of [government] authority" as enforced by courts. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985). By balancing

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[2] In *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 444 (6th Cir. 2003), the Sixth Circuit Court of Appeals even suggested that *Grutter* permitted "considerable deference" in the context of abortion regulations.

interest groups against one another and thus ensuring that they could not unite, the framers expected to prevent the oppression or exploitation of minorities. *See The Federalist No.* 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

Too much deference, however, threatens to deflate the power of judicial review itself. One of the jobs of the Court is to ensure that majorities do not exceed the Constitution by oppressing unpopular minorities. *Byrd*, 521 U.S. at 829 ("The irreplaceable value of [judicial review] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action" (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 69 (1985) (rationality review should "ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefitted"). In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall explained that courts could not entirely defer to decisionmakers, but should carefully scrutinize government policies to ensure that they are not "pretext[s] . . . for the accomplishment of objects not intrusted to the government." *Id.* at 423. Deference is especially inappropriate where the democratic process cannot be relied upon to protect the rights of the minority. *Carolene Products, supra*; *Compare, Beach Communications*, 508 U.S. at 314 (deferential standard of review is appropriate where Court " 'presumes that . . . improvident decisions will eventually be rectified by the democratic process . . . .' " (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979))).

In some cases, a deferential standard of review is appropriate to avoid imposing impossible burdens on administrators. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference appropriate because "[j]udges are not experts in the

field, and are not part of either political branch of the Government . . . [and] it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."). But even under the most deferential standard of review, the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The Court cannot completely defer to administrative decisions, especially when it comes to racial distinctions. *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985) (deference inappropriate where administrative decision based on irrational prejudice).

In *Turner v. Safley*, 482 U.S. at 89, this Court held that prison regulations are, as a rule, subject to a type of rational basis scrutiny. *Turner* based this conclusion on the fact that higher standards of scrutiny would "hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," and would "distort the decisionmaking process." *Id.*

Yet this Court has also disclaimed the suggestion that prisoners shed all their rights when they are imprisoned. *Shaw v. Murphy*, 532 U.S. 223, 228-29 (2001). Indeed, "[i]nmates retain . . . the right to be free from racial discrimination." *Id.* (citing *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam)). Further, the Court has asserted that *all* governmental action based on race is subject to strict scrutiny. *Adarand*, 515 U.S. at 227.

The Court might reconcile these two positions if it finds that the California racial separation scheme is narrowly tailored to advance a compelling government interest. The Court might find that preventing imminent racial violence is a compelling government interest. *See, e.g., Lee, supra; Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment); *Grutter*, 123 S. Ct. at 2352 (Thomas and Scalia, JJ., dissenting). And it might find that the race separation policy at issue here meets the criteria of

narrow tailoring set forth in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Or, the Court might find that a nonimminent threat of violence does not establish a compelling state interest, and that the policy does not take sufficient account of "particularized circumstances," to satisfy the narrow tailoring requirement. *Lee,* 390 U.S. at 334 (Black, Harlan, Stewart, JJ., concurring). Amicus Pacific Legal Foundation takes no position on this issue. But in either case, the Court should not further erode strict scrutiny, either by employing *Turner*'s rational basis standard here or by deferring to prison officials in the style of *Grutter*.

Holding that prisoners may be segregated by race simply to avoid interfering with the "inordinately difficult undertaking" of running a prison, *Turner*, 482 U.S. at 85, would threaten the Court's half-century tradition of suspicion toward race-based classifications. There is no principled reason why such deference would not be accorded to any other government agency, whose undertaking is also inordinately difficult, such as the military—*but see Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring) ("Today, it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions")—or for that matter, a public school. *But see Brown, supra.*

Avoiding further deterioration of strict scrutiny, and ensuring that it is applied in *every* case of racial discrimination by the government, is vital if this Court is to ensure that racial distinctions are not a permanent feature in American life. The Court should apply a meaningful analysis under the strict scrutiny standard required by *Korematsu* and *Adarand.*

III

THE PROPER ANALYSIS MUST FOCUS ON THE GENUINENESS OF THE DANGER OF RACIAL VIOLENCE

According to *Turner*, 482 U.S. at 89, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." According to *Adarand*, however, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227. Reconciling these two positions requires addressing the "legitimacy" of the penological interest at issue in this case. That, in turn, means that courts should independently weigh the state's evidence that segregating inmates by race is actually a necessary and proper way of solving race-based conflicts in prisons. *See, e.g., Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs . . . . But . . . racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline'" (quoting *Lee*, 390 U.S. at 334).). Such an approach keeps the burden of proof on the state, where it belongs under a strict scrutiny standard. Also, it ensures that the Court's focus is on the actual necessity and propriety of the prison regulation, rather than on the burdens faced by, or the expertise of, prison officials. Deferring to such burdens or such expertise is too broad a rationale, and would permit the state to engage in pretextual racial discrimination. The requirement of equal protection should not be escaped simply because complying with it is too burdensome. *See Bounds*, 430 U.S. at 825 ("the cost of protecting a constitutional right cannot justify its total denial").

Independently analyzing the necessity and propriety of the race-based classification would permit the Court to ensure that

California's prisons obey the Equal Protection Clause. This Court has employed such independent scrutiny before. In *Pell v. Procunier*, 417 U.S. 817, 822-25 (1974), the Court independently weighed the validity of a regulation of prisoners' access to news reporters. And in *Bounds*, the Court held that prisons must provide adequate access to legal research materials, despite the state's argument that this requirement would interfere with prison administration. "[J]udicial restraint is often appropriate in prisoners' rights cases," the Court noted, but "we have also repeatedly held that this policy 'cannot encompass any failure to take cognizance of valid constitutional claims.'" 430 U.S. at 832 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

Deference to prison authorities, by contrast, could ratify patently unconstitutional practices. For example, in *Nichols v. McGee*, 169 F. Supp. 721, 723 (N.D. Cal. 1959), the Plaintiff alleged that he was "subjected to systematic segregation, discrimination and degradation solely on account of his race," because he was "lodged in an exclusively Negro cell within [the] cellblock . . . required to join an exclusively Negro line when proceeding into the prison dining halls . . . [and] required to eat in a walled-off and exclusively Negro compartment in said dining halls." The court, however, deferred to the prison officials because "[f]ederal courts have long been loath to interfere in the administration of State prisons," *id.* at 724, and dismissed the complaint for not showing "a sufficiently grave and substantial interference with any right of plaintiff, which reaches such constitutional magnitude as would justify the intervention of this Court." *Id.* at 725. Such a holding is unimaginable today. *Nichols*, like *Korematsu*, demonstrates that an overly deferential standard of review is simply incapable of protecting Americans from racial discrimination.

CONCLUSION

Strict scrutiny is the appropriate standard of review in all cases of government discrimination based on race. Such scrutiny should not defer to the abilities of, or the burdens on, prison authorities. Rather, the burden should be on the state to establish to the Court's independent judgment that the race-based policy is both necessary and proper. Amicus Pacific Legal Foundation therefore urges this Court to hold that strict scrutiny must apply to all instances of race-based classification by the government.

DATED: May, 2004.

Respectfully submitted,

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(7)

No. 03-636

Supreme Court, U.S.
FILED
JUN 3 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 27, 2003
CERTIORARI GRANTED MARCH 1, 2004

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Appendix T — Letter From Tanya L. Forsheit Of Proskauer Rose LLP To The Clerk Of The United States Court Of Appeals For The Ninth Circuit Dated June 26, 2003 ..... 448a

The following opinion, decision, and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed February 25, 2003 ..... 1a

Decision Of The United States District Court For The Central District Of California Dated July 30, 2001 ..... 32a

Order Of The United States Court Of Appeals For The Ninth Circuit Filed July 28, 2003 ..... 36a

APPENDIX A — DOCKET OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHNSON V. ROWLAND, ET AL

01-56436

Court of Appeals Docket #: 01-56436
Filed: 8/22/01
Nsuit: 2550 Prisoner- civil rights (USdf)
Johnson v. Rowland, et al
Appeal from: Central District of California, Los Angeles

- -

Case type information:

1) prisoner petition
2) state
3) Civil rights

- -

Lower court information:

District: 0973-2: CV-95-01192-CBM
presiding judge: Consuelo B. Marshall, Chief Judge
court reporter: Dawn Bullock, Court Reporter
Date Filed: 2/24/95
Date order/judgment: 7/31/01
Date NOA filed: 8/9/01

- -

Fee status: paid

Appendix A

Prior cases:

95-55118 JTS MB null
Date filed: 2/2/95 Date disposed: 3/9/95
Disposition: jurdef/jdg

94-56374 null null null
Date filed: 10/19/94 Date disposed: 11/4/94
Disposition: cpc.dn/jdg

97-55063 JTS EL SRT
Date filed: 1/16/97 Date disposed: 3/17/97
Disposition: af/jdg

97-56308 DRT TGN AJK
Date filed: 9/26/97 Date disposed: 10/24/97
Disposition: cpc.dn/jdg

98-55076 null null null
Date filed: 1/16/98 Date disposed: 12/4/98
Disposition: 42-1/stf

98-55302 BBF DWN MB
Date filed: 2/20/98 Date disposed: 3/21/00
Disposition: af.rv/per

Current cases:

	Lead	Member	Start	End
companion:				
	01-56423	01-56436	8/22/01	
cross appeal:				
	01-56322	01-56423	8/21/01	
docketing link only:				
	98-55302	01-56322	8/9/01	

Docket as of March 9, 2004 11:15 pm

Appendix A

GARRISON S. JOHNSON
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v.

Appendix A

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JAMES H. GOMEZ, Director, Department of Corrections Defendant - Appellee	Sara Turner, Esq. (See above) [COR LD NTC dag]
JAMES ROWLAND Defendant - Appellee	Sara Turner, Esq. (See above) [COR LD NTC dag]

- -

01-56436

GARRISON S. JOHNSON

Plaintiff - Appellant

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ,
Director, Department of Corrections;
JAMES ROWLAND

Defendants - Appellees

Appendix A

8/22/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 8/20/01; appellee's designation of RT is due 8/29/01; appellant shall order transcript by 9/10/01; court reporter shall file transcript in DC by 10/9/01; certificate of record shall be filed by 10/16/01, for Consuelo B. Marshall; appellant's opening brief is due 11/26/01; appellees' brief is due 12/26/01; appellants' reply brief is due 1/8/02; [01-56436] (pg) [01-56436]
8/22/01	Filed representation statement of appellant by counsel Aaron P. Allan (CASEFILE) [01-56436] (pg) [01-56436]
8/22/01	Filed Aaron P. Alaln for Appellant Garrison S. Johnson in 01-56436 Civil Appeals Docketing Statement served on 8/9/01 (to CONFATT) [01-56436] [01-56436] (pg) [01-56436]
8/22/01	Prev 98-55302 BBF DWN MB TO ANY PANEL [01-56436] (aw) [01-56436]
9/11/01	Filed order Promo: (Deputy Clerk: jlc) Pla's mtn for voluntary dismissal of his appeal, 1-56423, under FRAP 42(b) is granted. A certified copy of this order sent to the dc shall act as and for mandate of this ct as to appeal No. 1-56423 only. Appeal No. 1-56436 shall proceed with the br sch as follows: the opening br and excs are due

Appendix A

11/26/01, the ans br is due 12/26/01, and the optional rpy br is due 14 days from service of the ans br. [01-56436] (gva) [01-56436]

9/19/01 Case rejected from Circuit Mediation Program. (sa) [01-16332 01-16495 01-16577 01-16612 01-16712 01-16723 01-16754 01-16798 01-35682 01-35742 01-35752 01-35772 01-55811 01-55902 01-56021 01-56249 01-56250 01-56273 01-56322 01-56401 01-56436 01-56437 01-56480]

11/27/01 Filed original and 15 copies Appellant Garrison S. Johnson opening brief (Informal: no) 30 pages and five excerpts of record in 1 vol; served on 11/26/01 [01-56436] (crw) [01-56436]

12/20/01 14 day oral extension by phone of time to file Appellee in 01-56436's brief. [01-56436] appellees' brief due 1/9/02, optional reply brief due 14 days from service of answering brief; (cb) [01-56436]

1/9/02 Filed original and 15 copies appellees 28 pages brief, & 5 copies of suppl EOC in 1 vol; served on 1/9/02 [01-56436] (mhf) [01-56436]

1/14/02 14 day oral extension by phone of time to file 's reply brief. [01-56436] appellants' reply brief due 2/6/02; (king) [01-56436]

Appendix A

2/7/02 Filed original and 15 copies Garrison S. Johnson in 01-56436 reply brief, (Informal: NO) 14 pages; served on 2/6/02 [01-56436] (mhf) [01-56436]

3/26/02 Calendar check performed [01-56436] (aw) [01-56436]

4/8/02 Calendar materials being prepared. [01-56436] [01-56436] (mw) [01-56436]

4/11/02 CALENDARED: PASA Jun 7 2002 900 am Courtroom 1 ** 9:30 am ** [01-56436] (aw) [01-56436]

5/10/02 Filed notice dated 5/9/02 of representation of Tanya Forsheit for aplt [01-56436] (mhf) [01-56436]

5/14/02 Filed order (Deputy Clerk: hh) For the convenience of the crt, this case is continued from the 6/7/02 calendar & will be rescheduled before the next available panel (Phoned csl: 9:55 & faxed to PANEL) [01-56436] (mhf) [01-56436]

7/16/02 Calendar check performed [01-56436] (aw) [01-56436]

7/29/02 Calendar materials being prepared. [01-56436] [01-56436] (rei) [01-56436]

7/31/02 CALENDARED: Pasadena Oct 10 2002 9:00 a.m. Courtroom 2 [01-56436] (th) [01-56436]

Appendix A

8/21/02 Filed certificate of record on appeal RT filed in DC: 10/16/01 [01-56436] (pg) [01-56436]

8/21/02 FILED CERTIFIED RECORD ON APPEAL IN: 3 clerk's records, 2 reporter's transcripts. From dc transmittals. [01-56436] (jk) [01-56436]

10/10/02 ARGUED AND SUBMITTED TO Procter R. HUG, Melvin BRUNETTI, Diarmuid F. O'SCANNLAIN [01-56436] (rmw) [01-56436]

2/25/03 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Procter R. HUG; Melvin BRUNETTI; Diarmuid F. O'SCANNLAIN, author.) FILED AND ENTERED JUDGMENT. [01-56436] (hh) [01-56436]

3/11/03 Filed original and 50 copies Appellant Garrison S. Johnson pet for rhrg & pet for rhrg enbanc 16 p.pages, served on 3/10/03 (PANEL & ALL ACTIVE JUDGES) [01-56436] (mhf) [01-56436]

3/26/03 Filed order (Diarmuid F. O'SCANNLAIN): Aples are directed to file a response to aplt's pet for rhrg & pet for rhrg en banc filed on 3/11/03. The response shall be filed within 21 days of the date of this order, & aples will provide this crt with 50 copies. [01-56436] (mhf) [01-56436]

Appendix A

4/16/03 Filed Appellees State of California, et al., response to aplt's petition for panel rehearing with suggestion for rehearing en banc [4677875-1]; served on 4/16/03y (PANEL AND ALL ACTIVE JUDGES) [01-56436] (hh) [01-56436]

7/1/03 Filed aplt Garrison S. Johnson in 01-56436 additional citations, served on 6/26/03 (PANEL) [01-56436] (mhf) [01-56436]

7/28/03 Filed order (Procter R. HUG, Melvin BRUNETTI, Diarmuid F. O'SCANNLAIN): The panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain voted to deny the petition for rehearing en banc, and Judges Hug & Brunetti so recommended. The full court was advised of the Suggestion for Rehearing En Banc. A judge of this court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. The petition & the Suggestion are thus DENIED. FERGUSON, Circuit Judge, with whom Circuit Judges Pregerson, D.W. Nelson, & Reinhardt join, dissenting from our court's denial of rehearing en banc [01-56436] (mhf) [01-56436]

8/4/03 Filed Appellant Garrison S. Johnson in 01-56436's motion to stay the mandate. served on 8/1/03 [Author] [01-56436] (mhf) [01-56436]

Appendix A

8/12/03 Filed order (Procter R. HUG, Melvin BRUNETTI, Diarmuid F. O'SCANNLAIN): Aplt's mtn to stay the mandate is GRANTED until 10/31/03 to permit aplt to file a petition for certiorari with the US Supreme Court. If before that date a petition for certiorari is filed, this stay shall remain in effect until final disposition by the Supreme Court. [01-56436] (mhf) [01-56436]

11/3/03 Received notice from Supreme Court: petition for certiorari Supreme Court No. #03-636 filed on 10/27/03. [01-56436] (mhf) [01-56436]

3/9/04 Filed Supreme Court order (SC Date: 3/1/04) The pet for a writ of ceritorari is GRANTED. (PANEL) [01-56436] (mhf) [01-56436]

APPENDIX B — DOCKET OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

GARRISON S JOHNSON V.
STATE OF CALIFORNIA, ET AL

CIVIL DOCKET FOR CASE #: 95-CV-1192

Filed: 02/24/95
Assigned to: Judge Consuelo B. Marshall
Jury demand: Defendant
Referred to: Magistrate Judge Brian Q. Robbins
Demand: $0,000
Nature of Suit: 550
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:1983 Prisoner Civil Rights

GARRISON S JOHNSON
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Appendix B

2:95cv1192

GARRISON S JOHNSON

plaintiff

v.

THE STATE OF CALIFORNIA; JAMES ROLLAND; JOHN DOE; CALIFORNIA DEPARTMENT OF CORRECTIONS; JAMES GOMEZ, Director of the Department of Corrections; JAMES ROWLAND

defendant

- -

2/24/95	1	COMPLAINT (Summons(es) issued) (am) [Entry date 02/28/95]
2/24/95	—	CASE REFERRED to Magistrate Judge Brian Q. Robbins (am) [Entry date 02/28/95]
2/24/95	2	NOTICE and ORDER of Reference to Magistrate Judge Brian Q. Robbins (am) [Entry date 02/28/95]
2/24/95	3	ORDER granting lv to file action w/o prepayment of fees by Magistrate Judge Brian Q. Robbins (am) [Entry date 02/28/95]

Appendix B

3/6/95 4 MINUTES by Magistrate Judge Brian Q. Robbins: This case has been referred to Magistrate Judge Robbins for P/T proceedings. All future pleadings & correspondence shall be addressed to Clerk to Magistrate JudgeRobbins. See document re preparing & submitting pleadings & correspondence. CR: n/a. (gk) [Entry date 03/10/95]

3/6/95 5 ORDER by Magistrate Judge Brian Q. Robbins that the U.S. Marshal is auth to proceed w/ svc of process upon James Rolland, Director of California Dept. of Corrections in his individual capacity only, w/o prepayment of costs, until fur ord of Crt. (gk) [Entry date 03/10/95]

3/6/95 6 ORDER by Magistrate Judge Brian Q. Robbins that within 20 days of the date of this Ord, plf shall file w/ the crt a ntc that all required documents have been submitted to the U.S. Marshal Service. (gk) [Entry date 03/10/95]

3/9/95 7 MOTION/APPLICATION by plf Garrison S. Johnson for an ord directing the U.S. Marshal to effect svc w/o payment of fees. (gk) [Entry date 04/04/95]

4/17/95 8 MOTION OR APPLICATION by plf Garrison S. Johnson for an ord directing the U.S. Marshal to effect svc w/o the payment of fees. (gk) [Entry date 04/26/95]

Appendix B

4/18/95 9 NOTICE by plf Garrison S. Johnson of submission of documents to U.S. Marshal. (gk) [Entry date 04/26/95]

5/30/95 11 MOTION by plf Garrison S. Johnson for leave to amend complaint. (gk) [Entry date 06/10/95]

6/5/95 10 RETURN OF ORIGINAL SUMMONS and RETURN OF USM 285 of summons & complaint served upon James Rolland (individual capacity) by mail on 5/18/95; w/ waiver of svc of sms by Sara Turner, as atty of record for dft James Rowland, sent by U.S. Marshal's Office on 4/20/95 & acknowledged on 5/18/95. (gk) [Entry date 06/06/95]

6/7/95 14 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of plf's motion for leave to amend complaint [11-1]. Plf is hereby GR lv to file a 1st A/C. Plf has 23 days from the date of this Ord to file a 1st A/C. CR: n/a. (gk) [Entry date 06/30/95]

6/19/95 12 NOTICE OF MOTION AND MOTION by dft James Rowland to dismiss; motion hearing set for 3:00 7/25/95; memo of PA in suppt thereof. (gk) [Entry date 06/30/95]

6/21/95 13 MINUTES by Magistrate Judge Brian Q. Robbins: Hrg date on dft's motion to dismiss [12-1] is VACATED. On 6/12/95 crt issued a minute ord allowing plf to file a 1st A/C, due

by 7/5/95. Thus, dft's mot to dismiss is deemed moot. Dft may if he wishes renew his mot to dism after svc of the 1st A/C. CR: n/a. (gk) [Entry date 06/30/95]

6/23/95 15 FIRST AMENDED COMPLAINT [1-1] by plf Garrison S. Johnson; terminating dfts James Rolland & John Does; adding dfts California Department of Corrections & James Gomez. (gk) [Entry date 07/07/95]

6/23/95 17 MOTION by plf Garrison S. Johnson for svc of cmp by U.S. Marshal. (gk) [Entry date 07/18/95]

7/3/95 16 FIRST AMENDED COMPLAINT [15-1] by plf Garrison S. Johnson; terminating dft CA Dept of Corrections; adding dft Jame Rowland. (gk) [Entry date 07/07/95]

7/10/95 18 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of a document fld by plf on 7/3/95 entitled "1st A/C." Plf fld a 1st A/C on 6/23/95. Plf is advised that if plf wants to amend the cmp fld on 6/23/95 he ask lv of the Crt to file a 2nd A/C. Plf is ORD to provide a stat rpt to this Crt within 21 days indicating whether he wishes to proceed on the 1st A/C of 6/23/95 or whether he wishes to amend his cmp. CR: n/a. (gk) [Entry date 07/18/95]

7/24/95 19 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of a document fld by plf entitled "stat rpt" & "mot for lv to amend cmp." Plf is GR 30 days from the date of this Ord to file a 2nd A/C. CR: n/a. (gk) [Entry date 07/31/95]

8/1/95 20 STATUS REPORT by plf Garrison S. Johnson. (gk) [Entry date 08/05/95]

8/8/95 21 SECOND AMENDED COMPLAINT [16-1] by plf Garrison S. Johnson. (gk) [Entry date 08/14/95]

8/31/95 22 NOTICE OF MOTION AND MOTION by dft Rowland to dismiss; motion hearing set for 3:00 9/26/95; memo of PA in suppt thereof. (gk) [Entry date 09/13/95]

9/5/95 23 MOTION by plf Garrison S. Johnson requesting court to order dfts to resp to plf's 2nd A/C. (gk) [Entry date 09/13/95]

9/5/95 24 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of a document fld by plf entitled "2nd A/C." Crt will accept the 2nd A/C. Plf is advised that he must properly serve the 2nd A/C on dfts. CR: n/a. (gk) [Entry date 09/13/95]

Appendix B

9/18/95	25	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson req svc by usm (kr) [Entry date 09/22/95]
9/28/95	26	OPPOSITION by plf Garrison S. Johnson to dft's motion to dismiss in suppt of aff [22-1]. (gk) [Entry date 10/05/95]
10/6/95	27	ORDER by Magistrate Judge Brian Q. Robbins vacating hearing re motion to dismiss [22-1] was fld by dft Rowland. ORD tht the rply be fld NLT 10-17-95. (es) [Entry date 10/18/95]
10/19/95	28	Reply to plf's opposition by defendant James Rowland to motion to dismiss [22-1] (es) [Entry date 10/23/95]
11/22/95	29	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson for order directing the US Marshal to svc deft; motion hearing set for (jc) [Entry date 12/04/95]
1/9/96	30	REQUEST by plaintiff Garrison S Johnson for Waiver of Sms (jc) [Entry date 01/12/96]
1/22/96	31	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson for stat rpt; motion hearing set for (jc) [Entry date 01/24/96]

Appendix B

1/23/96	32	ORDER by Chief Judge Wm. M. Byrne, Pur to the recommended procedure adopted by the Crt for the creation of the cal of Judge Kim McLane Wardlaw, Case transferred frm the cal of Judge Gadbois, Jr., to the cal of Judge Kimberly M. Wardlaw for all further proceedings. Case shld now read CV 95-1192 KMW (BQR). (es) [Entry date 01/24/96]
4/23/96	33	MOTION by plaintiff Garrison S Johnson for order requesting Dist Judge to issue an ord in this case for reason stated herein. (ab) [Entry date 04/24/96]
6/18/96	34	MINUTES: granting motion for order directing the US Marshal to svc deft [29-1]; The svc shl be solely on Mr James gomez who is the only named deft in the the 1st A/C; the defense my refi a mtn to dism based solely on pltf's 1st A/C. Deftf's previous motion to dismiss [22-1] moot. by Magistrate Judge Brian Q. Robbins CR: n/a (jc) [Entry date 06/24/96]
7/15/96	35	ORDER by Magistrate Judge Brian Q. Robbins dismissing the complaint [21-1]. Plf sh w/i 23 dys fr the dt of entry of this order, file an amnded cmp. It should be labeled Third Amnded Cmp. It should in no way refer to 2nd amnded cmp. (ENT 7/17/96), mld cpys & ntcs. (tw) [Entry date 07/17/96]

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8/1/96	36	3RD AMENDED COMPLAINT [16-1] by plaintiff Garrison S Johnson (jc) [Entry date 08/05/96]
8/22/96	37	NOTICE OF MOTION AND MOTION by defendant James Rowland to dismiss Third A/C for failure to state cause of action and barred by statute of limitations ; motion hearing set for 3:00 9/24/96 (th) [Entry date 08/26/96] [Edit date 08/26/96]
8/22/96	38	MEMORANDUM of points and authorities by defendant James Rowland in support of motion to dismiss Third A/C [37-1] (th) [Entry date 08/26/96]
8/22/96	39	REQUEST by defendant James Rowland for JUDICIAL NTC (jc) [Entry date 08/26/96]
8/29/96	40	ORDER by Magistrate Judge Brian Q. Robbins vacating hearing re motion to dismiss Third A/C for failure to state cause of action and barred by statute of limitations [37-1]; Opp or stmt of non opp be fi nlt 9/12/96; Rply fi nlt 9/19/96 (jc) [Entry date 09/09/96]
9/4/96	42	ORDER by Magistrate Judge Brian Q. Robbins; tht US Marshal is auth to proc w/ svc of process upon dfts ONLY w/o prepayment of cost until fur ord of the crt; James Gomez, Dire of Corr, individually & James Roland, Fomer Dir, individually (jc) [Entry date 09/16/96]

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9/9/96	41	OPPO by plaintiff Garrison S Johnson to motion to dismiss Third A/C for failure to state cause of action and barred by statute of limitations [37-1], motion req svc by usm [25-1] (jc) [Entry date 09/10/96]
9/19/96	43	RPLY TO OPP by defendant James Rowland to motion to dismiss Third A/C for failure to state cause of action and barred by statute of limitations [37-1] (jc) [Entry date 09/20/96]
9/23/96	44	NOTICE by plaintiff Garrison S Johnson of submission of docs to U.S. Marshal (np) [Entry date 10/03/96]
11/27/96	45	NOTICE OF MOTION AND MOTION by defendant James Gomez to dismiss third amended cmp; motion hearing set for 3:00 1/7/97 (shb) [Entry date 12/03/96]
11/27/96	46	MEMORANDUM of PA by defendant James Gomez in support of motion to dismiss third amended cmp [45-1] (shb) [Entry date 12/03/96]
12/2/96	47	ORDER by Magistrate Judge Brian Q. Robbins vacating hearing re motion to dismiss third amended cmp [45-1], Opp nlt 12/18/96, rply nlt 1/2/97 (dmjr) [Entry date 12/04/96]

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12/9/96	48	WAIVER OF SERVICE of SUMMONS by defendant James Rowland sent by plf on 10/1/96 by Sara Turner, atty, USM retn (dmjr) [Entry date 12/10/96]
12/9/96	49	WAIVER OF SERVICE of SUMMONS by defendant James Gomez sent by plf on 10/1/96 by Sara Turner, atty; USM retn (dmjr) [Entry date 12/10/96]
12/13/96	50	OPPOSITION by plaintiff motion to dismiss third amended cmp [45-1] (dmjr) [Entry date 12/16/96]
12/17/96	51	Ret RECEIPT of Proof of del of ord dtd 12/2/96 by legal mail rec by - illegible sign, on 12/6/96. (lori) [Entry date 12/18/96] [Edit date 12/18/96]
1/3/97	52	REPLY by defendant James Gomez to response to motion to dismiss third amended cmp [45-1] (dmjr) [Entry date 01/06/97]
3/14/97	53	MOTION by plaintiff Garrison S Johnson for appointment of counsel (jag) [Entry date 03/18/97]
3/14/97	54	MOTION by plaintiff Garrison S Johnson for svc of amd cmp upon dfts Peter Stamison & Bert Roberts by US Marshal (jag) [Entry date 03/18/97]

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3/14/97	55	MOTION by plaintiff Garrison S Johnson for leave to file amd cmp (jag) [Entry date 03/18/97]
3/18/97	56	MINUTES: Plf's motion for appointment of counsel [53-1] is DENIED. by Magistrate Judge Brian Q. Robbins CR: n/a (jag) [Entry date 03/20/97]
3/20/97	57	MINUTES: Plf's motion for leave to file amd cmp [55-1] is DENIED w/out prej. Plf may renew his mot after the crt has ruled on the currently pending mot to dism fld by dfts in this actn. by Magistrate Judge Brian Q. Robbins CR: n/a (jag) [Entry date 03/24/97]
7/1/97	58	REPORT AND RECOMMENDATION of U.S. Magistrate Judge Brian Q. Robbins that Crt ent an ord granting dfts' mots to dism & dism pla's 3rd A/C w/prej. (dh) [Entry date 07/07/97]
7/2/97	59	NOTICE OF FILING REPORT AND RECOMMENDATION of U.S. Magistrate Judge Brian Q. Robbins and lodging of proposed judgment &/or ord (dh) [Entry date 07/07/97]
7/14/97	60	OBJECTIONS by plaintiff Garrison S Johnson to Report and Recommendation [58-1] (jag) [Entry date 07/16/97]

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11/14/97	61	MOTION by plaintiff Garrison S Johnson requesting final judgment (jag) [Entry date 11/18/97]
1/8/98	62	ORDER by Judge Kim M. Wardlaw adopting report and recommendation motion NOTICE OF FILING REPORT AND RECOMMENDATION [59-1] (ENT 1/9/98) mld cpys (bp) [Entry date 01/09/98] [Edit date 01/09/98]
1/8/98	63	JUDGMENT AND ORDER: It is ADJUDGED that the dft's mots to dismiss are granted, and that pla's third amd cmp is dismissed without lv to amd by Judge Kim M. Wardlaw terminating case NUNC PRO TUNC 8/12/97 (ENT 1/9/98) MD JS-6 mld cpys & ntc. (bp) [Entry date 01/09/98]
1/20/98	64	NOTICE OF APPEAL by plaintiff Garrison S Johnson to 9th C/A from Dist. Court Jgm & Ord fld 1/8/98 & ent 1/9/98 (cc: Garrison S. Johnson; State Attorney General) Fee: Billed. (pjap) [Entry date 02/03/98]
2/11/98	65	TRANSCRIPT DESIGNATION and ordering form. (ghap) [Entry date 02/17/98]
3/6/98	66	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [64-1] 98-55302 (weap) [Entry date 03/06/98]

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3/17/98	67	MINUTES:ntc of referral; the attached ntc of referral directed to Judge Wardlaw by the US Crt of appeals is being ref to Mag Judge Robins for his recommendation by Judge Kim M. Wardlaw CR: none (ab) [Entry date 03/19/98]
3/31/98	68	ORDER re CERT OF APPEALABILITY by Judge Kim M. Wardlaw; Crt has reviewed the matter, It is ordered that the Cert of Appealability [64-1] is DENIED. There has been no substantial showing of the denial of a constitutional right. (ENT 4/2/98). mld cpys & ntcs. (jag) [Entry date 04/02/98]
7/14/98	69	9thcca Order: Appellant's mot for appointment of cnsl is den. Appellant's mot for a certificate of probable cause is den as unnecessay. (weap) [Entry date 07/27/98]
12/2/98	70	CERTIFICATE of Record Transmitted to USCA (98-55302) (cc: all parties) (pjap) [Entry date 12/02/98]
12/2/98	—	CLERK'S record on appeal transmitted to Circuit vols: 1 (pjap) [Entry date 12/02/98]
4/17/00	—	LODGED cc 9th CCA Ord: Jgm of said Dist Crt hereby is affirmed in part & remanded in part. Each pty shll bear their own costs. (98-55302) (FWD TO CRD) (pjap) [Entry date 04/27/00]

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4/28/00 71 NOTICE OF REASSIGNMENT Of Case Upon Rcpt of Mandate Frm The Ninth Circuit Crt of Appeals. Case randomly reassgned to Judge Consuelo B. Marshall for all fur procdngs. Case no. now reads as CV 95-1192 CBM (BQR) (cc: all counsel) (rn) [Entry date 05/01/00]

5/10/00 72 MINUTES: In its decision, the 9th CCA has dir tht the Dist Crt shl req the appt of pro bono cnsl. The US Mag Judge has on 5/8/00 requested the appt of said pro bono cnsl from the US Mag Judge coordinating the pro bono cnsl prog. The Crt will issue a fur ord setting a status conf in this mttr at the ti tht pro bono cnsl is designated by Magistrate Judge Brian Q. Robbins (pbap) [Entry date 05/12/00]

5/16/00 73 MANDATE from Circuit Court of Appeals affirming in part & reversing in part is filed & spread on the minutes of this crt (dmjr) [Entry date 05/17/00]

5/16/00 74 CERTIFIED COPY of judgment from USCA affirming in part & rrmanding in part, each party s/bear own costs (ENT 5/17/00) (cc: all counsel) (dmjr) [Entry date 05/17/00]

5/16/00 75 RECORD on appeal returned from U.S. Court of Appeals vols: 1 (pjap) [Entry date 06/14/00]

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6/19/00 76 ATTORNEY SUBSTITUTION: terminating attorney Garrison S Johnson for Garrison S Johnson by plaintiff Garrison S Johnson and substituting attorney Kenneth Ingber by Judge Consuelo B. Marshall (pbap) [Entry date 06/22/00]

7/5/00 78 FOURTH AMENDED COMPLAINT [36-1] by plaintiff Garrison S Johnson; jury demand. Summons smms issd (pbap) [Entry date 07/12/00]

7/5/00 79 Certification OF INTERESTED PARTIES filed by plaintiff Garrison S Johnson (pbap) [Entry date 07/12/00]

7/11/00 77 MINUTES: Kenneth S. Ingber, Esq. having substituted in as cnsl of record in this mttr on 6/19/00, ORD cnsl for plf and cnsl for dft to appear for ; status conference set on 3:00 8/9/00 by Magistrate Judge Brian Q. Robbins (pbap) [Entry date 07/11/00]

7/11/00 80 NOTICE OF DISCREPANCY AND ORDER by Magistrate Judge Brian Q. Robbins Plf's 4th A/C w/summons; cert as to int ptys rcvd o n 7/5/00 are to be fld and processed. (pbap) [Entry date 07/12/00]

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7/20/00	81	PROOF OF SERVICE executed upon defendants James Rowland, James H Gomez on 7/17/00 by US Mail by delivering 4th A/C to Sara Turner Esq, California Attorney General & Barbara C Spiegel Esq, Attorney General's Office (ad) [Entry date 07/21/00]
8/3/00	83	ANSWER filed by defendant James Rowland, defendant James Gomez to 4th amended complaint [78-1]; jury demand (pbap) [Entry date 08/09/00]
8/7/00	82	PROOF OF SERVICE executed upon defendant State of CA on 8/1/00 by personal svc by delivering sums, 4th A/C to Silvia Francisco, Legal Analyst auth to accept svc (jp) [Entry date 08/08/00]
8/7/00	150	NOTICE OF DISCREPANCY AND ORDER by Magistrate Judge Brian Q. Robbins ordering Gomez & Rowland's ans to cmp submitted by defendant James Rowland, defendant James Gomez received on 8/3/00 to be fld and processed; fld date to be the date the doc was stamped "received but not fld" w/the Clerk (pbap) [Entry date 05/03/02]
8/16/00	84	REQUEST by defendant James Rowland, defendant James Gomez for lv to take the depo of plf, a person confined in state prison. (pbap) [Entry date 08/18/00]

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8/16/00	—	LODGED/PROPOSED ORDER submitted (FWD TO CRD) (pbap) [Entry date 08/18/00]
8/21/00	85	ORDER by Magistrate Judge Brian Q. Robbins declined motion request [84-1] (pbap) [Entry date 08/23/00]
8/22/00	87	JOINT REPORT OF EARLY MEETING OF COUNSEL filed. Estimated length of trial 2-3 days (pbap) [Entry date 08/25/00]
8/22/00	88	MINUTES: status hrg hld on 8/9/00 by Magistrate Judge Brian Q. Robbins CR: n/a (dmjr) [Entry date 08/25/00]
8/24/00	86	STIPULATED SCHEDULING ORDER by Magistrate Judge Brian Q. Robbins; discovery ddl set on 12/8/00; fur status conference set on 3:00 1/19/01 (pbap) [Entry date 08/25/00]
8/25/00	89	2ND REQUEST by defendant James Gomez, defendant James Rowland for lv to take the depo of plf, a person confined in state prison. (pbap) [Entry date 08/29/00]
8/30/00	90	MINUTES: granting motion request [89-1]; IN COURT HEARING RE: sched set on 10:30 10/5/00 by Magistrate Judge Brian Q. Robbins**see min ord for addtnl info** (pbap) [Entry date 08/30/00]

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1/19/01	92	MINUTES: mandatory status conference held Cnsl enter their appearance. For the reasons stated on the record, cnsl are to lodge with the crt a stip re the continuance of the previous dates set. by Magistrate Judge Brian Q. Robbins CR: n/a (shb) [Entry date 01/24/01]
1/23/01	91	STIPULATION and ORDER by Magistrate Judge Brian Q. Robbins; discovery ddl set on 3:00 1/19/01; motion filing ddl set on 3:00 1/19/01 (shb) [Entry date 01/24/01]
2/7/01	93	STIPULATION and ORDER by Magistrate Judge Brian Q. Robbins; discovery ddl set on 3/19/01; motion filing ddl set on 4/9/01 (pbap) [Entry date 02/12/01]
4/9/01	94	NOTICE of lodgement of depo transcript of Plf Garrison S. Johnson in suppt of Mot for Summary Jgm by defendants; Ldg (1) Vol depo transcript (ir) [Entry date 04/09/01]
4/9/01	95	NOTICE OF MOTION AND MOTION by S Cambra, dfts James Rowland, James Gomez, for summary judgment purs to Rule 56 FRCP; motion hearing set for 10:00 5/7/01; Lodged proposed orders (dw) [Entry date 04/12/01] [Edit date 04/17/01]
4/9/01	96	MEMORANDUM PA IN SUPPORT by S Cambra, dfts James Rowland, James Gomez of motion for summary judgment [95-1] (dw) [Entry date 04/12/01] [Edit date 04/17/01]

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4/9/01	97	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson for summary adjudication of his 2nd & 3rd clm for relief; motion hearing set for 10:00 5/7/01; Lodged Stmt & Ord (mch) [Entry date 04/12/01]
4/9/01	98	MEMORANDUM OF P/A by plaintiff Garrison S Johnson in suppt of motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (mch) [Entry date 04/12/01]
4/9/01	99	DECLARATION of Jeff Garcia Hilger by plaintiff Garrison S Johnson in suppt of motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (mch) [Entry date 04/12/01]
4/9/01	100	PROOF OF SERVICE by plaintiff Garrison S Johnson on 4/9/01 of Ntc of Mot & Mot by plf Garrison Johnson for Summary Adjudication of his 2nd & 3rd clm for relief; Memo of P/A in suppt (see doc for fur details) (mch) [Entry date 04/12/01]
4/10/01	101	AMENDED DECLARATION OF SERVICE on 4/9/01 of Propsd Ord Granting Dfts' Mot for S/J (mch) [Entry date 04/12/01]
4/10/01	102	AMENDED DECLARATION OF SERVICE on 4/9/01 of Stmt of Uncontroverted Fact & Conclusions of Law (mch) [Entry date 04/12/01]

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4/10/01 103 AMENDED DECLARATION OF SERVICE on 4/9/01 of Dfts' Memo of P/A in Suppt of Motion for S/J (mch) [Entry date 04/12/01]

4/10/01 104 AMENDED DECLARATION OF SERVICE on 4/9/01 of Dfts' Ntc of Motion for S/J (mch) [Entry date 04/12/01]

4/12/01 105 ORDER by Magistrate Judge Brian Q. Robbins re compliance with FED.R.CIV.P. 56 and Local Rule 7.14. (pbap) [Entry date 04/13/01]

4/23/01 106 NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson to strike certain decls & exhs offered in suppt of dfts' mot for summary jgm; motion hearing set for 10:00 5/7/01; memo of evidentiary objections (ir) [Entry date 04/24/01]

4/23/01 107 MEMORANDUM of PA filed by plaintiff Garrison S Johnson in opposition to dfts' motion for summary judgment [95-1] (ir) [Entry date 04/24/01]

4/23/01 108 RESPONSE by plaintiff to dfts' stmt of uncontroverted fact & stmt of genuine iss in suppt of motion for summary judgment [95-1] (ir) [Entry date 04/24/01]

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4/23/01 109 OPPOSITION by defendant James Rowland, defendant James Gomez and S. Cambra to motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (pbap) [Entry date 04/25/01]

4/25/01 110 MINUTES: The Crt hereby strikes Plf's motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] for the failure to comply w/Local Rule 7.4.1 by Judge Consuelo-B. Marshall CR: n/a (SEND) (ir) [Entry date 04/25/01]

4/25/01 111 MINUTES: (IN CHAMBERS) The Crt is in receipt of plf's doc entitled motion to strike certain decls & exhs offered in suppt of dfts' mot for summary jgm [106-1] & dft's "opp to Plf's mot for summary adjudication of iss" fld on 4/23/01 & set for hrg on 5/7/01 @ 10:00. THE HEARING DATE IS HEREBY VACATED. The hrg will be held on 5/18/01 @ 3:00 before US Mag Judge by Magistrate Judge Brian Q. Robbins (SEND) (ir) [Entry date 04/26/01]

4/27/01 116 JNT RENOTICING OF MOTION by plaintiff Garrison S Johnson for summary adjudication of issues and dfts's mot for summ jgm; motion hearing set for 10:00 5/7/01 Lodged ord (pbap) [Entry date 05/02/01]

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4/30/01 112 REPLY by defendants J Rowland, J Gomez & S Cambra to Plf's opp to dfts' motion for summary judgment [95-1] (ir) [Entry date 05/01/01]

4/30/01 113 REPLY by plaintiff Garrison S Johnson to dfts' opp to Plf's motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (ir) [Entry date 05/01/01]

4/30/01 114 EVIDENTIARY OBJECTIONS by plaintiff Garrison S Johnson to decls submitted in opp to Plf's motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (ir) [Entry date 05/01/01]

5/1/01 115 EVIDENTIARY OBJECTIONS to decl of Pelican Bay State Prison Associate Warden B. O'Neil submitted in reply to Plf's opp to dfts' motion for summary judgment [95-1] fld by Plf Garrison S Johnson (ir) [Entry date 05/02/01]

5/4/01 117 ORDER by Judge Consuelo B. Marshall resetting hearing on motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] 10:00 6/4/01 (dmjr) [Entry date 05/07/01]

5/22/01 118 RESPONSE by defendants to plf's statement of uncontroverted fact & conclusions of law (jp) [Entry date 05/25/01]

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5/22/01 119 OPPOSITION by defendants to plf's motion to strike certain decls & exhs offered in suppt of dfts' mot for summary jgm [106-1] (jp) [Entry date 05/25/01]

5/29/01 121 MINUTES: that the motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] is submitted; motion hearing off-cal, that the motion for summary judgment [95-1] is submitted; motion hearing off-cal by Judge Consuelo B. Marshall CR: n/a (dmjr) [Entry date 05/31/01]

5/30/01 120 MINUTES: referring motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] to Judge Harry L. Hupp, setting hearing on motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] 10:00 6/11/01 by Judge Consuelo B. Marshall CR: n/a (dmjr) [Entry date 05/31/01]

6/11/01 122 MINUTES: Proceedings: Cross-mots for s/j. The matter has been transferred to this court for the hrg of these motions only. All further proceedings will be before Judge Marshall. Plf's mot for partial summ jgm is denied, the court findings trialable issue of fact on 2d claim and that dfts are entitled to summ jgm on the conspiracy claim. The mot of dfts Gomez, Rowland, and Cambra are granted as to claims 1 (8th Amendment) and 3

(conspiracy) and denied as to claim 2 (Equal Protection). Fur, the mot of said dfts for dismi based on qualified immunity is denied. This min ord is the crt's order on these motions. No more formal order is necessary. (ENT 6/14/01) mld cpys & ntc **see min ord for addtional info** re [116-1] by Judge Harry L. Hupp CR: Cynthia L. Mizell (pbap) [Entry date 06/14/01]

6/25/01 123 NOTICE OF MOTION AND MOTION by defendant S Cambra, defendant James Rowland, defendant James Gomez for reconsider of denial of qualified immunity; motion hearing set for 10:00 7/30/01 Lodged prop ord (pbap) [Entry date 06/27/01]

6/25/01 — LODGED/PROPOSED ORDER submitted (FWD TO CRD) (pbap) [Entry date 06/27/01]

6/25/01 124 DECLARATION of cnsl by defendant James Rowland, defendant James Gomez, defendant S. Cambra (pbap) [Entry date 06/27/01]

6/25/01 125 MEMORANDUM IN SUPPORT by defendants of motion for reconsider of denial of qualified immunity [123-1] (pbap) [Entry date 06/27/01]

6/27/01 126 MINUTES: setting hearing on motion for reconsider of denial of qualified immunity [123-1] 10:00 7/30/01 by Judge Harry L. Hupp CR: na (dmjr) [Entry date 06/29/01]

6/28/01 127 MEMORANDUM OF PA IN OPPOSITION by plf Garrison S. Johnson to dfts' motion for reconsideration [123-1]. (gk) [Entry date 07/03/01]

6/28/01 128 AMENDED NOTICE by dfts J. Rowland and J. Gomez of mot & mot for reconsideration of denial of qualified immunity. (gk) [Entry date 07/03/01]

7/13/01 129 NOTICE OF APPEAL by defendant James Rowland, defendant James Gomez to 9th C/A from Dist. Court min ord fld 6/11/01, ent 6/14/01 [122-1] (cc: Sara E. Turner, Dep Atty Gen; Proskauer, Rose LLP) Fee: Billed. (wdc) [Entry date 07/16/01]

7/13/01 130 REPRESENTATION STATEMENT re appeal [129-1]. (wdc) [Entry date 07/16/01]

7/19/01 — Appeal Fee Paid re [129-1] fee in amount of $105.00. (weap) [Entry date 07/19/01]

7/23/01 131 REPLY by defendant to response to motion for reconsider of denial of qualified immunity [123-1] (dmjr) [Entry date 07/26/01]

7/30/01 132 MINUTES: granting motion for reconsider of denial of qualified immunity [123-1] as to dfts James Rowland and James H. Gomez. The action is dism as to said dfts on the basis of qualified immunity by jgm signed and filed

this date by Judge Harry L. Hupp CR: Cynthia L. Mizell. (ENT 7/31/01) mld cpys & ntc (pbap) [Entry date 07/31/01]

7/30/01 133 ORDER by Judge Harry L. Hupp granting motion for reconsider of denial of qualified immunity [123-1]. ORD that Dfts Rowland and Gomez are entitled to qualified immunity and that summ jgm be entered in favor of Dfts Jamez ah. Gomez and James Rowland and against Plf and this action be dismissed as to dfts Gomez and Rowland with prej forthwith. (ENT 7/31/01) mld cpys & ntc (pbap) [Entry date 07/31/01]

8/6/01 134 NOTICE OF APPEAL by plaintiff Garrison S Johnson to 9th C/A from Dist. Court Mins fld 6/11/01 & ent 6/14/01 [122-1], Ord fld 7/30/01 & ent 7/31/01 [15-1], Mins fld 7/30/01 & ent 7/31/01 [16-1] (cc: Garrison S. Johnson; Sara Turner; Deputy Atty Gen) Fee: Billed (weap) [Entry date 08/09/01]

8/9/01 135 NOTICE OF APPEAL by plaintiff Garrison S Johnson to 9th C/A from Dist. Court Ord fld 7/30/01 & ent 7/31/01 [133-1] (cc: Aaron P. Allan, Proskauer Rose, LLP; Bill Lockyer, Paul D. Gifford, Deputy Attorney General) Fee: Paid. (pjap) [Entry date 08/09/01]

8/9/01 136 REPRESENTATION STATEMENT re appeal [135-1] (pjap) [Entry date 08/09/01]

8/16/01 137 Appellant's Notice of request for transcript & Statement of Issues on appeal (dl) [Entry date 08/17/01]

8/20/01 138 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [129-1] 01-56322 (dl) [Entry date 08/20/01]

8/23/01 139 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [134-1] 01-56423 (weap) [Entry date 08/23/01]

8/23/01 140 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [135-1] 01-56436. (wdc) [Entry date 08/23/01]

8/27/01 — LODGED CC 9th CCA ORDER Applnt's mot for voluntary dism gr. App dism. (01-56322) (FWD TO CRD). (cbr) [Entry date 08/30/01]

8/29/01 141 MANDATE from Circuit Court of Appeals dismissing the appeal is filed & spread on the minutes of this crt (dmjr) [Entry date 08/30/01]

8/29/01 142 CERTIFIED COPY of Appellate Court Order: dismissing the appeal [129-1] (dmjr) [Entry date 08/30/01]

9/10/01 143 TRANSCRIPT DESIGNATION and ordering form for dates: 6/11/01, 7/30/01 CR: Cynthia L. Mizell. (wdc) [Entry date 09/13/01]

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9/17/01 — LODGED CC 9th CCA ORDER Plf's mot for voluntary dism of his app 01-56423 under FRAP 42(b) is GR. App No. 01-56436 shall proceed w/briefing sched as follows: opening brief & excerpts of record due 11/26/01, answering brief due 12/26/01 & optional reply brief due 14 days from svc of answering brief. (01-56423, 01-56436) (FWD TO CRD) (pjap) [Entry date 09/27/01]

9/21/01 144 CERTIFIED COPY of Appellate Court Order: dismissing the appeal No. 01-56426 [134-1] (shb) [Entry date 09/26/01]

9/21/01 145 MANDATE from Circuit Court of Appeals The court orders that the mandate of the Ninth Circuit Court of Appeals dismissing appeal is hereby filed and spread upon the minutes of this US District Court. THe record reflects that costs of th eprevailing party were taxed by the Court of Appeals for the Federal CIrcuit in the amount of $554.42 on 8/23/00 (shb) [Entry date 09/26/01]

9/21/01 146 MINUTES: req to proceed on apppeal ifp is referred to Mag Robbins by Judge Consuelo B. Marshall CR: n/a (dmjr) [Entry date 09/27/01]

10/16/01 147 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 6/11/01, 7/30/01 (Re: [135-1]) CR: Cynthia Mizell (weap) [Entry date 10/17/01]

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10/16/01 — TRANSCRIPT filed for proceedings held on 6/11/01 (weap) [Entry date 10/17/01]

10/16/01 — TRANSCRIPT filed for proceedings held on 7/30/01 (weap) [Entry date 10/17/01]

10/22/01 — LODGED CC 9th CCA JGM of the said Dist Crt hereby is dism. (FWD TO CRD) (01-56423) (ghap) [Entry date 10/26/01]

10/23/01 148 CERTIFIED COPY of Appellate Court Order: 01-56423 that the appeal is DISMISSED. (pbap) [Entry date 10/23/01]

10/23/01 149 MANDATE from Circuit Court of Appeals dismissing appeal is hereby filed and spread upon the minutes of this District Crt. (pbap) [Entry date 10/23/01]

5/8/02 151 CLERK'S record on appeal transmitted to Circuit [135-1] vols: 3 transcripts: 2, (Not included: Docket Nos. 62, 63, 68, 119, 123 - 125) (01-56436) (pjap) [Entry date 05/08/02]

6/4/02 152 RECORD on appeal returned from U.S. Court of Appeals re appeal [135-1] vols: 3, transcripts: 2. (dl) [Entry date 07/02/02]

8/20/02 153 CLERK'S record on appeal transmitted to Circuit [135-1] vols: 3 transcripts: 2 (01-56436) (pjap) [Entry date 08/20/02]

Appendix B

8/20/02 154 CERTIFICATE of Record Transmitted to USCA (01-56436) (cc: all parties) (pjap) [Entry date 08/20/02]

8/15/03 155 ORDER FROM USCA Appellant's motion to stay mandate granted until 10/31/03, to permit Appellant to file petition for certiorari with United States Supreme Court. If before that date petition for certiorari is filed, this stay shall remain in effect until final disposition by Supreme Court. (01-56436) (wdc) [Entry date 08/18/03]

APPENDIX C — FOURTH AMENDED COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS [DEMAND FOR JURY TRIAL] DATED JUNE 17, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO. CV-95-01192-CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

FOURTH AMENDED COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS

[DEMAND FOR JURY TRIAL]

INTRODUCTION

1. This case arises from the invidious discrimination by the State of California Department of Corrections, and its current and former Directors, James H. Gomez and James Rowland, in formulating and implementing a policy and

practice of housing prison inmates based solely on their race. The race-based discriminatory housing policy has escalated racial tensions in the prison population, fostered violence and distrust among the prison inmates, and created conditions which have subjected plaintiff to duress, oppression, and other cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The discriminatory policy has also deprived plaintiff of the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff seeks damages for the deprivation of his constitutional rights and injunctive relief to remedy the discriminatory practices identified herein.

PARTIES

2. Plaintiff Garrison S. Johnson ("Mr. Johnson") is a prisoner in the custody of the California Department of Corrections, inmate #D59672. Mr. Johnson has been incarcerated in the State of California since 1987.

3. The State of California is a sovereign state within the United States and has the capacity to sue and be sued. The California Department of Corrections ("CDC") is an agency of the State of California.

4. Defendant James Rowland ("Mr. Rowland") was, from 1987 to 1991, the Director of the California Department of Corrections. Plaintiff is informed and believes, and based thereon alleges, that Mr. Gomez' responsibilities included the formulation and implementation of CDC policy, as well as the oversight of the operation and safety of all CDC facilities.

5. Defendant James H. Gomez ("Mr. Gomez") is, and has been since 1991, the Director of the California Department of Corrections. Plaintiff is informed and believes, and based thereon alleges, that Mr. Rowland's responsibilities include the formulation and implementation of CDC policy, as well as the oversight of the operation and safety of all CDC facilities.

6. Defendants sued herein as DOES 1-20 are unknown to Plaintiff and therefore are sued by their fictitious names. Plaintiff is informed and believes, and based thereon alleges, that each of the fictitiously named Defendants is responsible in some manner for the acts, errors and omissions alleged herein. Plaintiff will amend this Complaint to supply Defendants' actual names when the same are ascertained by Plaintiff.

JURISDICTION

7. This action arises under the Eighth and Fourteenth Amendments to the Constitution of the United States and is brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

8. The claims alleged herein arose in the County of Los Angeles, State of California. Therefore, venue is proper in the Central District of California pursuant to 28 U.S.C. § 1391.

Appendix C

FACTS COMMON TO ALL CLAIMS FOR RELIEF

9. Plaintiff is housed in a two-man cell at the California State Prison in the Antelope Valley. Since 1987, plaintiff has been housed at three California prison facilities: Folsom (1987-1992), Calipatria (1992-1994) and Lancaster-Antelope Valley (1994 to present). At each California prison facility where plaintiff has been housed, including the Antelope Valley facility, plaintiff has been segregated by race in cell assignment.

10. Plaintiff is informed and believes, and based thereon alleges, that the CDC has instituted a policy and practice of housing inmates based exclusively on the race and ethnicity of the prisoner, rather than based on the first available cell. Thus, African American prisoners are only housed with other African-American prisoners, Latino prisoners are only housed with other Latino prisoners, Caucasian prisoners are only housed with other Caucasian prisoners, and all "Other" prisoners are housed together. This discriminatory policy and practice treats prisoners from different racial and ethnic groups unequally without any rational relation to a permissible purpose and fosters enmity and distrust among them.

11. The discriminatory policy of housing inmates according to their race and ethnicity is evidenced by, among other things, the prison guards' refusals to integrate the cells and statements by guards and prison officials to plaintiff such as "You can't be placed in that cell. It's a white cell."

Appendix C

12. Racial segregation has reinforced division along gang lines and created an environment of fear, racism, and violence. The result of the policy and practice was, and is, foreseeable to defendants, and those foreseeable consequences have manifested themselves through violent outbreaks and riots at the California prisons. The same invariable consequences have been repeated over and over again since this policy has been instituted: violence, rioting, and racism. Defendants have acted recklessly and with deliberate indifference by ignoring the probable and foreseeable consequences of racial segregation, and in continuing to segregate prisoners with knowledge of the invariable result.

13. Plaintiff is informed and believes, and based thereon alleges, that other prison systems in the United States have been available to the CDC as a model for integrated prisons, but defendants have recklessly ignored these other models, in favor of a flawed policy of racial segregation.

14. Plaintiff is informed and believes, and based thereon alleges, that Mr. Gomez and Mr. Rowland are aware of the deleterious effects of segregation, and continue to perpetuate the policy because the racial tension created enables all prison staff members to collect the higher wages allowed during times of racial unrest.

15. Plaintiff is further informed and believes, and based thereon alleges, that the racial segregation practice perpetuates divisiveness among the inmates, which prevents them from uniting to present grievances against the prison. Plaintiff is informed and believes, and based thereon alleges,

that the CDC continues to implement the practice of racial segregation so that it will not have to address prisoner grievances which might otherwise be raised.

FIRST CLAIM FOR RELIEF

(For Eighth Amendment Cruel and Unusual Punishment Violation Against All Defendants)

16. Plaintiff hereby incorporates by references paragraphs 1 through 15, inclusive, as though fully set forth herein.

17. Plaintiff has been deprived of the minimal civilized measures of life's necessities because of the extraordinary duress, institutional violence, and emotional distress he has suffered, and continues to suffer, as a consequence of the policy and practice of racial segregation.

18. Plaintiff has been stripped of any sense of bodily security because of the threat of physical violence from other racially prejudiced prisoners harboring violent intent, and because of the threat of physical force from prison officials attempting to quash prisoner fighting and rioting. The concomitant emotional distress caused by this ceaseless threat of physical violence is so severe that plaintiff regularly obtains counseling from a prison psychologist.

19. Plaintiff is informed and believes, and based thereon alleges, the defendants have acted with recklessness and deliberate indifference toward plaintiff's health, safety and needs. The prison officials have allowed this policy of

segregation to continue in the face of the increasing racial tension and violence caused by the policy and practice of racial segregation, with an awareness that such violence jeopardizes the prisoners' health and safety.

20. Plaintiff has suffered severe humiliation, depression, and emotional distress by reason of the deprivation of his civil rights in an amount subject to proof at trial, but estimated to be in excess of $10,000.

SECOND CLAIM FOR RELIEF

(For Fourteenth Amendment Equal Protection Violation Against All Defendants)

21. Plaintiff hereby incorporates by reference paragraphs 1 through 15, inclusive, and paragraphs 17 through 20, inclusive, as though fully set forth herein.

22. Defendants have subjected plaintiff to racial discrimination, by employing a policy and practice of segregating prisoners in cells on the basis of race.

23. The racial segregation policy is not reasonably related to the legitimate penological interests of the CDC.

24. The policy and practice of racial segregation creates and fosters racial hostility and tension among the prisoners by ensuring that they remain divided, on a physical and psychological basis. These divisions inevitably create the stereotyping that leads to prejudiced attitudes and beliefs, and violence.

Appendix C

25. The climate of increased racial animosity has directly led to a sharp increase in the amount of racial violence perpetrated upon prisoners by other prisoners in the last decade. The policy and practice of racial segregation is therefore flawed and not rationally related to the legitimate penological interests of the CDC because it creates a situation where the occurrence of violence among prisoners is significantly heightened, not restrained. The pitting of racial groups against each other also develops the need for another layer of violence, because of the physical force that must be exerted by prison officials against prisoners to quell such physical altercations. All of the foregoing has resulted in a deprivation of plaintiff's civil rights.

26. Defendants have instituted the policy and practice of racial segregation out of malice and reckless indifference to the consequences of segregation.

27. Plaintiff has suffered damages by reason of the CDC policy of racial discrimination, including but not limited to, humiliation, fear, depression, and emotional distress. Plaintiff's damages are subject to proof at trial, but estimated to be in excess of $10,000.

THIRD CLAIM FOR RELIEF

(For § 1985(3) Conspiracy to Deprive a Person of the Equal Protection of the Laws)

28. Plaintiff hereby incorporates by reference each and every allegation contained in paragraphs 1 through 15, paragraphs 17 through 20, inclusive, and paragraphs 22 through 27, inclusive, as though fully set forth therein.

Appendix C

29. Plaintiff is informed and believes, and based thereon alleges, that defendants conspired between and among themselves to deprive plaintiff of the equal protection of the laws. Defendants have acted in concert with each other, and other unknown co-conspirators, to perpetrate a policy of segregation by race, although that policy is not related to legitimate penological purposes, and harms the physical and psychological safety of the prisoners, including Mr. Johnson.

30. Defendants acted in furtherance of the conspiracy to deprive plaintiff of his constitutional rights in order to obtain higher compensation and overtime, which is paid to prison staffs during times of racial crises.

31. Plaintiff has suffered damages as a result of the deprivation of his civil rights and the conspiracy engaged in by defendants in an amount subject to proof at trial, but estimated to be in excess of $10,000.

WHEREFORE, Plaintiff prays for relief as follows:

1. For declaratory relief that the policy and practice of racial segregation by the CDC violates the Eighth and Fourteenth Amendments to the Constitution of the United States;

2. For compensatory damages for deprivation of plaintiff's constitutional rights in an amount subject to proof at trial, but estimated to be in excess of $10,000;

3. For injunctive relief directing the CDC to cease its policy and practice of racial segregation;

Appendix C

4. For punitive damages;

5. For attorney's fees and costs;

6. For such other and further relief as the Court deems just and proper.

DATED: June 30, 2000

PROSKAUER ROSE LLP
BERT H. DEIXLER
KENNETH S. INGBER

By: s/ Kenneth S. Ingber
KENNETH S. INGBER

Attorneys for Plaintiff
GARRISON S. JOHNSON

Appendix C

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

DATED: June 30, 2000

PROSKAUER ROSE LLP
BERT H. DEIXLER
KENNETH S. INGBER

By: s/ Kenneth S. Ingber
KENNETH S. INGBER

Attorneys for Plaintiff
GARRISON S. JOHNSON

APPENDIX D — DEFENDANTS GOMEZ AND ROWLANDS' ANSWER TO THE COMPLAINT AND DEMAND FOR A TRIAL BY JURY DATED AUGUST 2, 2000

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO.: CV-95-01192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA[1], et al.,

Defendants.

DEFENDANTS GOMEZ AND ROWLANDS' ANSWER TO THE COMPLAINT AND DEMAND FOR A TRIAL BY JURY

In answer to the Fourth Amended Complaint, Defendants J. Gomez and J. Rowland hereby deny, admit and allege as follows:

Introduction.

1. In answer to paragraph 1, entitled "Introduction," Defendants deny the allegations.

1. Although named in the complaint as a Defendant, to counsel's knowledge, Defendant State of California has not been served with a summons or complaint.

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Parties.

2. In answer to paragraph 2, under the section entitled "Parties," Defendants admit the allegations of said paragraph.

3. In answer to paragraph 3, Defendants admit California is a state within the United States and admit the California Department of Corrections ("CDC") is an agency of the State of California. Except as expressly admitted, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

4. In answer to paragraphs 4-6, Defendants admit Defendant James Rowland is a former Director the California Department of Corrections ("CDC"), admit Mr. Rowland's and Mr. Gomez' duties included the formulation and implementation of CDC policy, deny James Gomez is the current Director of the CDC and allege Mr. Gomez is a former Director of the CDC. Except as expressly admitted herein, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

Jurisdiction.

5. In answer to paragraphs 7-8, under section entitled "Jurisdiction," Defendants admit this Court has jurisdiction over claims brought pursuant to 42 U.S.C. section 1983. Except as expressly admitted, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

Appendix D

Facts Common to All Claims for Relief.

6. In answer to paragraph 9, Defendants admit Plaintiff is incarcerated at the California State Prison located in Lancaster and admit Plaintiff has been previously housed at prisons located in Folsom and Calipatria. Except as expressly admitted, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

7. In answer to paragraph 10, Defendants deny Defendants have a "discriminatory policy and practice that treats prisoners from different racial and ethnic groups unequally without any rational relation to a permissible purpose and fosters enmity and distrust among them." Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

8. In answer to paragraph 11, Defendants deny there is a discriminatory policy of housing inmates. Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

9. In answer to paragraph 12, Defendants deny the allegations.

10. In answer to paragraph 13, Defendants deny they have "recklessly ignored" other prison systems which "have been available to CDC as a model for integrated prisons." Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

Appendix D

11. In answer to paragraph 14, Defendants deny the allegations.

12. In answer to paragraph 15, Defendants deny that the CDC "continues to implement the practice of racial segregation so that it will not have to address prisoner grievances which might otherwise be raised." Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

First Claim for Relief.

13. In answer to paragraph 16, Defendants allege that they incorporate by reference the preceding paragraphs as if set forth here in full.

14. In answer to paragraphs 17 -19, Defendants deny the allegations.

15. In answer to paragraph 20, Defendants deny Plaintiff's civil rights have been violated by Defendants. Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

Second Claim for Relief.

16. In answer to paragraph 21, Defendants allege that they incorporate by reference the preceding paragraphs as if set forth here in full.

17. In answer to paragraph 22, Defendants deny the allegations.

18. In answer to paragraphs 23-24, Defendants deny there is a "racial segregation policy." Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

19. In answer to paragraph 25, Defendants deny there is a "policy and practice of racial segregation," deny there is a "pitting of racial groups against each other" and deny any Defendant deprived Plaintiff of his civil rights. Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

20. In answer to paragraph 26, Defendants deny the allegations.

21. In answer to paragraph 27, Defendants deny there is a "CDC policy of racial segregation." Defendants further deny Plaintiff is entitled to damages from any Defendant.

Third Claim for Relief.

22. In answer to paragraph 28, Defendants allege that they incorporate by reference the preceding paragraphs as if set forth here in full.

23. In answer to paragraphs 29-31, Defendants deny the allegations.

24. In answer to Plaintiffs prayer, including paragraphs 1-6, Defendants deny Plaintiff is entitled to the declaratory relief sought, deny Plaintiff is entitled to compensatory damages, deny Plaintiff is entitled to the injunctive relief

requested, deny Plaintiff is entitled to the recovery of punitive damages, deny Plaintiff is entitled to attorneys' fees and costs and specifically deny that Plaintiff is entitled to any relief whatsoever.

25. Except as expressly admitted herein, Defendants deny each and every allegation in the Fourth Amended Complaint pending investigation as to the truth or falsity of those allegations and the filing of further pleadings in this matter.

AFFIRMATIVE DEFENSES

1. Because the Amended Complaint is couched in conclusionary terms, Defendants cannot anticipate fully all affirmative defenses that may be applicable to this matter. Accordingly, the right to assert additional affirmative defenses, if and to the extent such affirmative defenses are applicable, is hereby reserved.

2. The Court lacks jurisdiction over some or all of Plaintiff's claims.

3. Plaintiff has failed to state a claim upon which relief can be granted.

4. Defendants are entitled to immunity, including qualified immunity.

5. Plaintiff's claims are barred, limited or controlled by the Prison Litigation Reform Act.

6. Plaintiff is estopped from claiming the damages requested.

7. Some or all of the Fourth Amended Complaint is barred by the applicable statute of limitations.

8. Defendants assert that Plaintiff has failed to pay the full amount of a filing fee or a partial payment of court fees as required by law.

9. Defendants assert that they are not liable to Plaintiff for any injury or damages, if there were any, caused by an exercise of discretion.

WHEREFORE, Defendants make demand pursuant to Rule 38 of the Federal Rules of Civil Procedure that the above-entitled matter be tried by and before a jury to the extent provided by law and pray for judgment as follows:

1. That judgment be rendered in favor of Defendants and against Plaintiff;

2. That Plaintiff takes nothing by this action;

3. That Defendants be awarded costs of suit and attorney's fees; and

4. That Defendants be awarded such other relief as this Court deems proper.

DATED: August 1, 2000

Respectfully submitted,

BILL LOCKYER
Attorney General

DAVID P. DRULINER
Chief Assistant Attorney General

PAUL D. GIFFORD
Senior Assistant Attorney General

DANETTE VALDEZ
Supervising Deputy Attorney General

s/ Sara E. Turner
SARA E. TURNER
Deputy Attorney General
Attorneys for Defendants
Gomez and Rowland

APPENDIX E — DEPOSITION OF GARRISON S. JOHNSON DATED OCTOBER 5, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192
CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

vs.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

DEPOSITION OF
GARRISON S. JOHNSON
LANCASTER, CALIFORNIA
OCTOBER 5, 2000

Deposition of GARRISON S. JOHNSON, taken on behalf of Defendants, at 44750 60th Street West, Lancaster, California, commencing at 10:35 a.m., Thursday, October 5, 2000, before Marchelle Hartwig, CSR No. 9347.

Appendix E

[commencing at page 5] GARRISON S. JOHNSON, having been first duly sworn, was examined and testified as follows:

MS. TURNER: For the record, we are here at Lancaster State Prison in Los Angeles County, California, and this is the deposition of Garrison S. Johnson. We are here regarding the case of Garrison S. Johnson versus the State of California, et al. Court No. 95-01192.

EXAMINATION

BY MS. TURNER:

Q Would you please state and spell your full name.

A Garrison Stuwart Johnson, G-a-r-r-i-s-o-n, S-t-u-w-a-r-t, J-o-h-n-s-o-n.

MS. TURNER: For the record present here today is myself, Sara Turner, deputy attorney general for the State of California on behalf of the Defendants Gomez and Rowland; the Plaintiff, Mr. Johnson; his attorney, Mr. Hilger; the court reporter, Ms. Hartwig, and Ms. Cruz from the litigation office at Lancaster, and Officer Hines.

Q Mr. Johnson, a deposition is similar to [6] testimony in court in that you are under oath. You understand you've been sworn in?

A Yes.

Q During this deposition you must reply truthfully and fully to the questions that you are asked. Your attorney can make objections but you still have to answer the questions generally unless your attorney tells you not to answer. Okay?

A Okay.

Q It's not my intent to ask you any trick questions. If you don't understand a question, please let me know and I will repeat it or I'll clarify it for you. In other words, you not required to answer a question you don't understand. So if you do answer a question, we are going to assume that you understood it. Okay?

A Yes.

Q This is important because if for some reason later on the question is used at trial, then we are making it clear for the record now that it's your responsibility to let us know if you don't understand it. Okay? Do you understand these procedures?

A Yes, I do.

Q You are not required to speculate or guess at matters which you have no personal knowledge about; [7] however, I am entitled to your best efforts at making estimates regarding times, distance or matters of which you might have personal knowledge. Okay?

A Okay.

Q You are doing fine giving good verbal responses, but I do want to remind you that the court reporter cannot record a shrug or an "uh-huh" or "huh-uh," so you have to use verbal responses. Okay?

A Okay.

Q Once the deposition is transcribed, we will provide a copy to your attorney and you will have an opportunity to review it and make corrections. However, we do have the right to comment on any corrections or changes that you would make to that deposition at trial, although you are entitled to make them. Do you understand that?

A Yes, I do.

Q You do understand that the testimony used today could be used at trial as direct evidence or to impeach or contradict something you may say at trial?

A Yes.

Q Do you have any questions regarding the procedure that I can answer for you?

A No, ma'am.

Q Now, I'm going to ask some questions about [8] your identity and competence, if I could. Have you ever used any other name?

A Yes. One time I used the name of Bo.

Q Spell that, please.

A B-o.

Q Do you have any aliases or is that an alias would you say?

A That's an alias.

Q Do you have any nicknames which you are known by or is that one that you —

A That's the one.

Q How about by family and friends? Do they know you by a nickname?

A Gary.

Q What is your prison number?

A D59672.

Q Your date of birth?

A 10/30/64.

Q Is there any reason that you know of why you cannot give your deposition today?

A None at all.

Q Are you sick or taking any medication?

A No.

Q Can you describe how you prepared for this deposition? What documents did you review?

[9] A I didn't review any documents.

Q Did you speak with any prison staff members in preparation for this deposition?

A No, I haven't.

Q Any inmates?

A No.

Q Anyone else? I'm not talking about your attorney.

A No, I haven't.

Q Do you keep a diary or journal about all the things that have happened to you?

A Somewhat.

Q Are any entries into your journal related to this lawsuit or the allegations in your complaint?

A I think I might have got one or two statements in there.

Appendix E

Q What would those pertain to if you can recall?

A I can't recall.

Q Would they be current or would they be of years back or —

A I believe it's current.

Q Have you had your deposition taken before?

A Yes, I have.

Q In what cases?

A I don't recall the cases.

[10] Q How many times have you had your deposition taken?

A I believe maybe once or twice. I'm not sure.

Q Were these cases against the California Department Of Corrections in some manner?

A Yes, they were.

Q What are the allegations of one of those complaints if you can remember one of those?

A I think one was excessive force.

Appendix E

Q What district is that pending in?

A It was in the southern.

Q Southern District of California. Who were the defendants?

A I think it was one defendant, a sergeant named Fork.

Q Like a spoon and a fork type Fork?

A Yes.

Q What was the result of that case? Has there been any final result if there has been?

A Yeah. I lost that case.

Q What would be the case number if you know? If not, what is the year that it was lodged?

A I don't know the number. The year was '95.

Q 1995. What institution were you pertaining to?

[11] A Calipatria.

Q Are you set to go to trial on any other case?

A No, I'm not.

Appendix E

Q Now, the second deposition, would that have been for another case if you recall?

A It would have been for another case.

Q Do you recall what case that was?

A I believe it was — I don't remember the title of the case.

Q Do you remember the defendants? Was it a CDC case, a California Department Of Corrections case?

A Yes, it was.

Q Do you recall who the defendants are?

A I remember one name.

Q What was that?

A Lieutenant Beltran.

Q Lieutenant Beltran. What institution?

A This one here.

Q So what district would it be in? Would it be in superior court or in —

A Central.

Appendix E

Q Central District. What are the allegations of the complaint?

A I don't recall.

Q What's been the final result of that case?

[12] A It was a summary dismissal.

Q Summary dismissal?

A Right.

Q Your case was dismissed; is that correct?

A Yes.

Q Do you have any other civil suits not pertaining to the California Department Of Corrections pending?

A I believe — yeah, I do have one.

Q What's that? Who are the defendants in that?

A Brown & Williamson.

Q Is that two people?

A It's a corporation, tobacco.

Appendix E

Q A tobacco corporation. Brown & Williamson. What do you allege in that case?

A Secondhand smoke case.

Q Have you prevailed in that case?

A It's on appeal.

Q What do you allege? That there is secondhand smoke?

A I'm subjected to secondhand smoke.

Q Is that outside of prison then?

A No. While I am in prison.

Q You are on appeal on that case. So did you lose in the district court then?

[13] A Yes, I did.

Q How about criminal proceedings? Have you ever testified in criminal proceedings?

A Yes, I have.

Q Did you testify in your own?

A Yes.

Appendix E

Q And in others; is that correct?

A Yes.

Q How many criminal proceedings have you testified in or been deposed in?

A I believe two.

Q What were the charges in your case?

A The case I'm in here now for is robbery, murder. And the other one was, I believe, receiving stolen property.

Q You testified in those two cases?

A Yes.

Q Were they both against you then?

A Yes, they were.

Q You were the defendant?

A Yes.

Q So you haven't testified in anybody else's proceedings as a witness?

A No.

Appendix E

Q Have you been deposed in administrative [14] proceedings?

A I'm not clear.

Q With the Department of Motor Vehicles or something, or Workers' Compensation? Any of those?

A No, I haven't.

Q I'm going to go ahead and kind of go into some personal data. Could you tell me your social security number, please?

A I don't know it by heart.

Q Your marital status?

A None.

Q Are you single?

A Yes.

Q Children and ages if you have any?

A One. It's a boy, age 14.

Q 14 years old. Are you presently working in prison?

A Well, yeah, I have a job. They got me assigned to yard crew.

Appendix E

Q You are in the yard crew?

A Yeah.

Q Are you just taking the day off today because of this?

A Because of this.

Q Do you have a trust account balance?

[15] A No, I don't.

Q Do you get paid for the yard crew work?

A No. There is no pay.

Q Do you receive any money from the outside?

A Yeah, family support.

Q Family sends you money then?

A Yes.

Q Do you have another source of income from the outside? Bank accounts? Real estate? Anything like that?

A No, I don't.

Q Let me ask you some questions about your criminal record. Did you mention your commitment offenses were — I thought you were talking about the present case. Was it robbery and murder?

A Murder.

Appendix E

Q Any other charges involved in that?

A I think there was a gun allegation.

Q Is that it?

A Yeah, I believe that's it.

Q How many murder charges were there?

A One.

Q How many robbery charges?

A Five.

Q What sentence are you serving?

[16] A 25 to life sentence.

Q 25 to life. The stolen property, is that a previous sentence or has that been since prison?

A That's previous.

Q Previous to that. Did you complete your sentence on that one then?

A Yeah.

Q Do you know your MEPD, minimum eligible patrol date, if I could?

Appendix E

A I think it's 2012, something like that.

Q 2012. What other convictions have you had besides the receiving stolen property? Was that a conviction?

A Yeah. I don't recall. My whole history is pretty extensive.

Q Have you ever had parole violated?

A No.

Q Have you been in prisons anywhere else in CDC?

A Yes.

Q What other prisons?

A Folsom, Calipatria, and CMC, I believe, in Lancaster.

Q Did you have a reception center that you went to? Do you recall that?

A Yeah. That's Chino.

[17] Q Local jails?

A L.A. County jail.

Q Always the same then?

A Yeah.

Q And the youth authorities; is that correct?

A I've never been in a youth authority.

Q Never been in a youth authority institution; is that correct?

A That's correct.

Q So when were you first incarcerated on your present sentence then?

A In '97.

Q Then you were housed in CIM for a reception period; is that correct?

A Yes.

Q Then did you go to Folsom after that?

A Yes, I did.

Q Then after Folsom where did you go?

A To Calipatria.

Q Did you say in your present sentence it was '97 or did you say '87?

A I made a mistake. I meant '86.

Q '86, okay. Why did you transfer from Folsom?

A I think it was a voluntary thing. They asked the inmates did they want to go to Calipatria. It was [18] just opening up.

Q Do you remember what year that was then?

A Between '92, '91. I am not sure.

Q Then after Calipatria where did you go?

A I went to CMC for like three months.

Q Why did you go to CMC?

A For a psychological evaluation.

Q You completed the evaluation?

A Yes.

Q Do you know what category that might have been?

A I believe they called it a J.

Q Then after you left CMC, where did you transfer to?

A To here.

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Q Why did you come to Lancaster? Do you know?

A I don't know.

Q Did you request Lancaster?

A No, I didn't.

Q I'm going to kind of move into your complaint here. Do you recall the incidents that form the basis of your complaint?

A Yes, I believe I do.

Q Do you know the name of your cell mate at this time?

[19] A I know his last name as Stubbs.

Q Mr. Stubbs. Do you have a CDC number by chance?

A I sure don't.

Q Do you recall previous cell mates before him? Do you recall their names and information about them?

A No. I might can go back to maybe two.

Q Two cell mates?

A Yeah.

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Q How long have you been in the cell with Mr. Stubbs?

A I just recently moved in with him, so maybe a couple months.

Q Who was your cell mate before Mr. Stubbs was?

A It was a guy by the name of Tyrone Jackson.

Q Did Mr. Jackson transfer out or —

A No. I moved from his cell to another cell, or the cell that he was in to another cell.

Q What was the reason for the move?

A Incompatability.

Q You're more compatible with Mr. Stubbs or you were not compatible with Mr. Jackson?

A Both.

Q Did you know Mr. Jackson before that?

A Yes, I did.

[20] Q Did you think you were compatible with him?

A Yes, I did.

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Q Sometimes you find you are not, huh?

A Yeah.

Q Close quarters; is that correct?

A That's correct.

Q You made a claim of invidious discrimination by two of the former directors of the California Department Of Corrections; is that correct?

A That's correct.

Q Do you know what invidious means? Do you know how to describe that word?

A I am not clear.

Q Would you describe it as malicious at all?

A Yeah, that's the definition.

Q Is it your claim that they intentionally discriminated against you?

A Yes.

Q Now, first of all, did you ever have any contact with Mr. Rowland? Did you ever have any personal contact with Mr. Rowland?

A No, I haven't.

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Q I'm sorry. I asked the question the same time you were answering that. I apologize. My mistake.

A I haven't had any personal contact with [21] Mr. Rowland.

Q You've never met him, then; is that correct?

A That's correct.

Q Did you ever have any personal contact with Mr. Gomez?

A No, I haven't.

Q Would you know those two gentlemen if you saw them here today?

A I don't believe I would.

Q I think your complaint, and correct me if I'm wrong, is that you said that Mr. Rowland and Mr. Gomez implemented a policy and practice of housing inmates based solely on their race?

A Yes, I did.

Q Do you have a copy of that policy that you are referring to?

A No.

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Q Have you ever seen a policy that would say that?

A No.

Q Would it surprise you — did you read my interrogatory responses that I have submitted on behalf of the defendants? Did you have a chance to read those?

A No, I haven't.

[22] Q I'm not aware of any policy. I mean, I have never located one. And I am just wondering if you had — you indicated you've never seen one?

A So are you saying there is no policy?

Q Well, I'm not saying that. I don't know. But so far we've never been able to come up with a policy.

A I haven't read one.

Q You have not. Okay. I thought maybe you might have something. Have you read Title 15?

A Yes, I have.

Q So it's certainly not the source of your policy; correct?

A That's correct.

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Q Let me ask you about your education. Did you graduate from high school?

A No.

Q Have you been getting some education while you've been here in prison since '86?

A Yep.

Q What level have you achieved would you say towards graduation from high school?

A Well, I attempted to take my GED one time. I got up to where I registered in 10th grade.

Q Approximately 10th grade then?

A Yeah.

[23] Q Are you continuing with your education or did you abandon that?

A I'm not. I'm on the yard crew now.

Q So you are working instead right now?

A Yeah.

Q Do you feel comfortable with reading?

A Yeah, I like to read.

Q So you know how to read well would you say?

A Yeah.

Q Maybe I know the answer to this question, but I'm going to ask. Have you had any criminal justice courses outside of prison?

A No.

Q So you have no background in administration of justice or prison administration?

A No.

Q You've never seen a policy, so there is — one has never been found, but if you do have a policy would you be sure that you make sure that I get a copy of that because you didn't bring one?

A Yeah, I would.

Q I'm making you laugh obviously. A little bit of levity here.

How many races are there would you say? Have you ever given some thought to that question?

[24] A Probably four to five different races in the system.

Q Four to five different races?

A Uh-huh.

Q What race are you a member of?

A The African-American.

Q The African-American race. Now, you mentioned a practice of housing inmates based solely on their race. Would you say that is one of your complaints?

A Yes, I would.

Q Can you tell me what that practice is?

A Yes. That practice is simply how inmates are housed based on the color of their skin. They put you in cells — if you are black, they look for a cell that has a black person. If you are white, they look for a cell that has a white person. They match you up based on your color.

Q From among those four to five races?

A Yeah. If you're Asian, they are going to look for an Asian. They classify Asians and Samoans as others, so they will look for a cell with the classification of others and they put you in there.

Q You talked about compatibility. Had you ever heard of a practice of housing people based on compatibility?

[25] A Yeah, I believe vaguely I have.

Q But it seems like that's something that you were mentioning was a reason for a recent change was compatibility?

A Yes.

Q Is your cell mate African-American?

A Yes, he is.

Q You are compatible with him?

A The one I got now, but the other African-American we wasn't compatible.

Q If you were compatible with someone of a difference race and you wanted to house with that person could you do that?

A Sure.

Q What would be — so compatibility is the key; is that correct?

A You wouldn't know that you are compatible until you first move in with a person.

Q Until you get to know them; is that right?

A Exactly.

Q When you transferred to Lancaster, for instance, is there a period of time where you are going through a reception orientation period?

A Yeah. I believe I went through orientation when I first got here.

[26] Q Was that a period of time where you could have gotten to know some other people?

A No. The orientation is simply they put you in a cell and you stay. You don't mingle amongst the general population until you get classified, go through some kind of classification committee.

Q Do you know the purpose of a classification when you are new to a prison?

A No.

Q Let me ask you a question about compatibility. For instance, if you had testified against someone, like your crime partner, if you had a crime partner in your offenses that you committed, and I believe you did; isn't that correct?

A Yes.

Q Now, say you had gone to trial and testified against that person and as a result of your testimony they ended up going to California State Prison. Okay? Now, if you were just placed in a cell with that person, could there have been a problem?

A I imagine there would be a problem.

Q Could that be — is that the purpose, that classification might be able to find out whether or not you know that person from previous history?

A I'm pretty sure that's one of the reasons for [27] classifying us.

Q What else, if you know, might be a reason for classification?

A Well, they want to see what type of jobs they want to give you or what type of program they want you to be involved with.

Q So programming, jobs. What I was describing, would that be an enemy type situation?

A Yeah.

Q Do you have any enemies in prison?

A No.

Q Do you have an enemy list?

A No.

Q Did you ever have one?

A No.

Q How about gang affiliation? Do you have a gang affiliation?

A No.

Q Did you ever have one?

A At one time.

Q Which gang?

A The Crip gang.

Q You were a member of the Crip gang?

A Yeah.

Q Would that be something that you would be [28] questioned about in classification?

A They never questioned me about that.

Q It never came up in a classification hearing?

A Not to my knowledge. I don't recall.

Q How about medical or mental health, has that ever come up in classification?

A It might have come up when I first came to the system.

Q I have a question. Would those items kind of lean towards finding someone who is compatible with you if you could match up in some of these areas, or is my question too speculative for you to be able to answer?

A Could you simplify it a little more, please.

Q Say, for instance, you go to classification. You haven't found anybody you are compatible with for having a cell mate and you go to classification and they ask you questions about your enemies and about your gang affiliation, possibly your programming or your mental and medical health, would this start to be able to find from that people who you might be compatible with in a cell?

A I don't think so.

Q You don't think that would have any — you don't think the enemy would be one?

A Well, if you have anyone listed as an enemy, [29] yes, that would be one. They would not put you in a cell with your enemy.

Q At classification would they have their paperwork in front of them to be able to look —

A Yes. They will know whether or not you have enemies.

Q So that would be one thing that they would check at that time before you were placed in a cell with someone?

A Yes.

Q What could happen if you were placed in a cell, for instance, with a person that you had put on an enemy list?

A I don't know. Probably have some type of altercation.

Q Who would you feel would be responsible for that?

MR. HILGER: Objection. Speculative. It's a strange question.

MS. TURNER: It's very speculative.

Q It would depend if you asked for that or if someone else placed that on you without your choice?

A I don't know.

Q That's fine.

That is pretty speculative. You are right.

[30] Now, once you find somebody that you are compatible with — now, you feel you are compatible with Mr. Stubbs. You talk a little bit about a violation of your constitutional rights in the area of the 8th amendment. Can you tell me what you mean by that if you know? If you don't know, I can be a little more specific in my questions if that would help you.

A Please do.

Q You said that you were deprived of the minimal civilized measures of life necessities because of invidious discrimination, policy or practice. Does that help you at all, or would you still like me to be more specific? Because my question is what do you mean by that? Can you explain to me what you mean? Do you get three meals —

A Yes. I believe that it's an 8th amendment violation for the way that the system houses inmates based on the color of their skin, it puts them at harm, and this sort of policy, procedure or practice causes one to be placed at risk physically, psychologically, et cetera.

Q Now, have you ever been deprived of the minimal civilized measures of life's necessities personally?

A Yes, I believe I have.

[31] Q Do you get three meals a day? Do you get offered three meals a day here in prison?

A Yeah. They are supposed to give you three meals a day.

Q Do you regularly get them?

A Yeah, regularly. Sometimes I might not get them.

Q What would be a situation where you would not get one?

A If you get an officer who wants to play games and don't let you out of the cell, you might lose your meal that time. That has happened to me before.

Q It's happened how many times?

A Not too often. I don't know.

Q Once?

A More than once.

Q Twice?

A More than twice.

Q Maybe more than three times?

A About five or six times.

Q For 13 years?

A Yeah.

Q Did you file a grievance about that?

A No.

Q But you could have; correct?

[32] A Yes.

Q You could have probably spoken to a sergeant?

A Yes.

Q But you chose not to?

A Yes.

Q But generally over the last 13 years you were offered your meals on a regular basis?

A Yes.

Q Do you have medical care here in the prison?

A Yes.

Q Have you ever utilized it?

A When I'm ill.

Q When you're ill?

A Yeah.

Q How about mental health care? Have you ever utilized those services?

A Yes, I have.

Q Would you have a medical chart? If I were to look for one, you would have one that's been growing over the years; is that correct?

A I don't know about growing, but I have one.

Q So if you are ill and you need medical or if you feel you need mental health care you are able to get it?

A Yes.

[33] Q How about shelter? Do you have —

A Yeah.

Q — a room?

A Room and board.

Q How about exercise opportunities?

A Yes.

Q I saw some gentlemen out on the yard.

A I have that.

Q Sanitary needs are met; is that correct? You have toilet facilities in your cell —

A Uh-huh.

Q — available to you?

A Yes, I do.

Q Do you have showers available to you?

A Yes, I do.

Q So really those are what I would describe as the minimal civilized measures of life's necessities. Can you think of any others?

A Yeah.

Q What is that?

A No, I can't think of any others.

Q You mentioned your safety. Now, have you ever been assaulted by somebody of a different race?

A No.

Q Have you ever been assaulted by somebody of [34] your own race?

A Yeah.

Q Have you been involved in mutual combat with people of your own race?

A Uh-huh.

Q Have you been involved in mutual combat with people of other races?

A No, not that I can think of.

Q So when you talk about your safety, do you feel your safety has been impacted by any of the practices here in the prison?

A Yeah.

Q Tell me about that.

A Well —

MR. HILGER: Objection. Calls for a narrative.

MS. TURNER: Well, he seems to have an instance that he wants to — makes a complaint unless he is making the complaint in a general sense.

Q Do you believe this could be the case or did it really happen to you?

A I believe that I'm at risk; that something can happen to me the way the system houses inmates, from other riots that I came across and was almost involved in, witnessed other people getting stabbed, killed [35] behind racial tension and riots.

Q So do you think there is racial tension in the prison?

A Yes. In this prison, in various other prisons.

Q Is it your contention that it's because of invidious discrimination by Mr. Gomez or Mr. Rowland?

A By the housing policies.

Q Those policies are unwritten policies; is that correct?

A I couldn't tell you that.

Q You don't know. Can you give me any examples, if you have any, of when you have been almost subject to being a victim of the policies?

A Well, I was incarcerated at Calipatria before the major riot broke out there with Mexican and black inmates. I was transferred right before that to CMC. I just escaped that. If I would have stayed there, I would have been involved in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based on your skin color. I'm black, and if I was there I would have been hurt.

Q But you don't know that for sure?

A Well, I went to see doctors, psychiatrists.

[36] My psychiatrist thought some of the issues were based on the fear that I have been put under, and through the history of my incarceration I fear that I might be harmed because of the housing policy.

Q This is a mental health fear that you carry?

A Mental. I feel that it's mental.

Q Who is your psychiatrist?

A I don't recall his name. As a matter of fact, he told me he can't help me.

Q When was the last time you saw him?

A I can't recall the date.

Q But essentially you were gone from Calipatria when any problems occurred?

A Essentially, but just in here you have racial riots happening here on a large scale. I was on C Yard and there was a major riot that happened there. I got transferred to A Yard just before it happened. That's my whole fear that one day it's going to catch up to me and I'm going to be there.

Q You believe this is based on a policy from Mr. Gomez or Mr. Rowland?

A I believe the directors of the Department Of Corrections are responsible for their policies in the way the institutions are being ran.

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Q But we've never located that policy that you [37] are talking about; correct?

A I don't know. I don't have access to the policy.

Q You are not referring to another policy?

MR. HILGER: Objection. Asked and answered.

BY MS. TURNER:

Q I'm going to show you this chrono here. Do you know Dr. Milan from Calipatria?

A It's been so long ago I don't know.

Q He wrote this chrono, and I'm going to show this to you. It's the middle one here that I would like you to take a look at. I'm going to read it to you.

MR. HILGER: Is this going to be marked as an exhibit?

MS. TURNER: No, I'm not going to mark it as an exhibit.

MR. HILGER: Do you have a copy?

MS. TURNER: No, I just have this one.

THE WITNESS: Okay.

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BY MS. TURNER:

Q Is that the one you were referring to from Calipatria prior to going to CMC, the fear that you had?

A Yeah, I believe some of it is.

[38] Q Let me take a look at that. Let me read that. "Inmate Johnson" with your CDC "is a 29-year-old black male who was treated by a psychiatrist as a child with Ritalin. For the past year he has been very paranoid regarding his relationship with white officers. He also hears voices and sees things in his cell, but he cannot recognize them. He has used cocaine heavily. Currently he is on antipsychotic medication." The plan was recommend transfer to CMC East or CMF for evaluation, and the date of that was October 15, 1993. Is that the one you were referring to when you left Calipatria?

A Well, that's kind of vague. He did a whole report and I told him that while I was in Calipatria that the officers there was basically harassing blacks, causing tension, and I was having a lot of anxiety. I couldn't sleep. And on that basis he recommended I go up to CMC, but that was basically the problem that I had in Calipatria.

Q The hearing voices and seeing things in the cell, are those related to the relationships with white officers at all?

A No. That don't have nothing to do with the white officers.

Q So that was unrelated to that?

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[39] A Yeah.

Q Let me get back to my train of thought here. Did you ever request to cell with somebody of a different race who you were compatible with?

A I don't believe I did, no.

Q Why not?

A I was never asked did I want to cell with another race or anything like that. All I know is that when I first came into the system they told me they had to find me a black cell.

Q Who is "they"?

A Whoever the officers are that do the cell assignments when you come into the system.

Q Do you know the officer's name?

A It's been so many years ago when I first came in. I couldn't tell you.

Q So this was when you first arrived at the prison?

A When I first arrived. They said any prison you go to they look for a cell for you based on your skin color.

Q But you did say you could house with anyone who you were compatible with of any race?

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MR. HILGER: Objection. Misstates his testimony. He didn't say that.

[40] BY MS. TURNER:

Q If you wanted to house with someone of a different race, you could; isn't that correct?

A I don't have no problem with housing with any color, any ethnicity, different race. No problem.

MR. HILGER: When you are asking if he could, I think he is understanding it in a general sense as to whether he would be able to get along. Not whether he would be able to within the system. I think that question is unclear.

BY MS. TURNER:

Q Okay. So within the California Department Of Corrections, if you wanted to house with somebody of a different race than you are, would your request be granted provided both of you agreed to it?

A I don't have no idea whether it would be granted.

Q If you read the interrogatory responses they indicate that that's the system of how they seek to find compatible cell mates.

A So what you are trying to tell me is that you have to ask to be in a cell with a different race if you wanted to live with a different race; otherwise, they just put you in a cell based on the color of your skin?

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[41] Q Well, it's my understanding that the key would be finding someone you're compatible with, period.

A Well, if I'm compatible with someone of my same race. But when you come into the system they don't ask you whether or not you are compatible. What they say is I've got to find you a cell based on your race, and that's where they put you in your cell. You don't find out that you are not compatible with a person until they put you up in here and you all are not on the same wavelength, you all don't see things clearly, you're arguing, then you go tell the person that controls the cells that we can't get along, and that's what incompatibility is all about. We can't get along. Then they try to tell you to go find somebody else that you can get along with.

Q Do you think that's unreasonable?

A I don't know whether it's unreasonable or not.

MR. HILGER: That's sort of vague. When you say "that," I'm not sure what you are referring to.

BY MS. TURNER:

Q That seems to me what you are describing to be your understanding of the practice then?

A Yes.

Q Do you think that's an unreasonable practice to try to find somebody whom you are compatible with?

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[42] A It depends. If they are only going to allow you to house or be in a cell with somebody just your race — if I tell them I'm not compatible, they expect me to go find somebody else black and try to find compatibility. If I go find somebody white or Mexican or another color and you tell them that me and this guy get along and we want to cell, I don't believe they would let us cell together.

Q Now, what you are saying is you don't believe it, but you've never asked that; is that correct?

A No, I never — see, that's what I'm saying. The whole system is designed where you house you don't know you are compatible until you get in there. If they house me in a cell with different races, I would know who I can live with. I would know who I could be compatible with other races.

Q But you meet people out in the yards or you meet people through 13 years living in the same place.

A Well, if you've got a system that's been operating like this for I don't know how long, and other inmates — everything is racially segregated. You can't go to a white guy and say, "Hey, man, I want to move with you." You can't cross the races. That will start the racial tension right there. So I know that I can't go to a white guy and say, "Hey, I want to [43] move with you" because he is not going to move with me.

Q What if he wants to move with you?

A I'm saying the system creates this.

Q What if he wants to move with you?

A Well, if he wants to move with me, we have got to try to move together.

Q So it would work then; correct?

A It should work.

Q It does, doesn't it?

A No, because you don't see it nowhere. You can go right here in this institution and you won't see no black and white, no black and Hispanic. You won't see it like that.

Q How about Hispanic and white?

A I don't know about that.

Q How about white and Asian?

A I don't know about that.

Q How about Asian and Hispanic?

A I don't know about that, but you won't — the thing is if you want to be realistic about it, all the other races get along except the blacks. So when it comes to a black issue and you want to live in a cell with one of them, you won't never see nothing like that. You won't never see it.

Q Well, you know, maybe you haven't seen it, but [44] actually the goal of the Department from reading the interrogatory responses is to find someone whom you are compatible with.

A Where are they doing it at? At what institution?

Q Well, this isn't my deposition.

MR. HILGER: You didn't ask a question. You made a statement.

BY MS. TURNER:

Q You haven't read the interrogatory questions. I know you haven't read them.

MR. HILGER: He hasn't had a chance to read the responses because I got them yesterday — I got them on Tuesday. Maybe we should take 10, 20 minutes and he can read the responses before we go forward.

MS. TURNER: Well, I don't think I am going to ask any more questions about it, to be honest. I think we have pretty well clarified the issue about the policy.

Q Have you ever been in a dorm?

A No, I haven't.

Q Are you familiar with dorm housing?

A No, I'm not.

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Q Is that because of your points?

A My custody level.

[45] Q Your custody level?

A Yes.

Q What is your custody level?

A Level 4.

Q Could you live with someone who's level 1?

A No.

Q What are your points? Do you know that?

A Maybe 103, 104, something like that.

Q Did you ever mention to anybody that you wanted to live with somebody of a different race?

A As far as prison officials?

Q Yes.

A No.

Q So you just filed the lawsuit?

A Yeah, based on the practices that the system has.

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Q You never filed a grievance about that?

A No. What brought it to my attention is that I know that there was an order telling CDC to stop housing people based on the color of their skin and put them in a cell with — put them in any available cell, and I noticed the system wasn't doing that.

Q What order was that? Can you tell me?

A I don't know.

Q Did you ever read it?

[46] A Yes, I did.

Q You don't know what the order was?

A It was a federal order from the federal courts.

Q What federal court was that? Do you know?

A I don't recall. So basically I felt I didn't have a choice as to living with someone of an opposite race based on the way they also tell me when I come in here we've got to find you a black cell. We have got to find you somebody black that you can live with, so that's what I thought.

Q Who said that to you?

A Like I said, I don't recall exactly. It's just normal procedures.

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Q But it was neither Mr. Gomez nor Mr. Rowland; is that correct?

A No, it wasn't them.

Q And you've never sued anybody else, is that correct, about this issue?

A That's true.

Q The federal court order that you are referring to appears — are you alleging that it was violated?

A Exactly.

Q Did you bring that to the attention of the federal court judge that issued the order, if there was [47] such an order?

A No, I didn't.

Q Now, you said I think in your complaint, I don't remember which paragraph it is, but I can find it. You said prison guards refused to integrate cells. I'm trying to find that.

A Prison officials?

Q Actually you used the word guards, or your attorney did. It's paragraph 11. Can you tell me what prison guards they were?

A Not offhand.

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Q Did you ever file an appeal on that issue?

A No.

Q You said that other prison systems, again, I don't have the paragraph and I will find it for you. You said that other prison systems have been available as a mode for integrated prison — as a model for integrated prison, but that the defendants ignored them. Can you tell me what other prison systems you are referring to?

A Please repeat that.

Q I believe you said that other prison systems have been available — were available as a model for integrated prisons, but that the defendants ignored them. Can you tell me what other prison systems you [48] are referring to?

A Like I said earlier, I'm from back east and the prison systems back there as well as the prison systems down south they don't house you the way the State of California do. You go to prison, you don't get no privilege to be housed in the cell with your same race. Part of your punishment is, hey, we are going to put you in there whether it's a black, it's Italian, it's a Puerto Rican. They just put you in the cell. In the State of California they give you the privilege of being housed with just your race only.

Q Now, do you consider that a privilege then?

A Yes, most definitely.

Q You are getting me a little confused. Do you know any of the prison systems — have you ever been in another prison in another state?

A No, but I have family members.

Q But you can't correspond with them if they are in prison; is that correct? Or can you?

A Not through the prison you can't.

Q But you've been able to get this information from family members?

A Family members and other individuals that have been incarcerated in other states.

Q And you have a family member in the state [49] prison here; is that correct?

A No.

Q Did you ever have one in here?

A Yes, I did.

Q Could you have celled with your family member if you would have liked to?

A If my family member was black, I think I could have.

Q If you wanted to cell with him, you could?

A Yes.

Q You would be compatible with your brother; is that correct? Is it your brother?

A Yes.

Q If you wanted to, you could; is that correct?

A Yes.

Q In paragraph 18 you said that racially prejudiced prisoners harbor violent intent against you. Can you tell me what you mean by that?

A I believe we covered that too. It's all based on the color of your skin. If a racial riot was to occur between blacks and any other race, because of my skin I could be harmed. If I could just manage to change myself to another color, you know, I could save myself.

Q Did you ever file a 602 about any of those [50] issues?

A I don't recall.

Q You mentioned severe humiliation in paragraph 20. Can you explain what you mean by that?

A Well, you know, like I said, I was seeing psychiatrists behind this. I have been depressed, mostly stressed out. I can't sleep because it constantly worries me. Even just to have to sit here and go through this deposition is humiliation in itself. Based on my psychological file that you just showed

me and based on my fear for white officers as well because I believe that the officers support the racial segregation in this system.

Q You believe the — which officers?

A Basically I believe that it's the white officers that support the racial segregation of the inmates from my experience in this system.

Q Can you tell me what you mean by "supports the segregation"?

A Well, a lot of stuff that — we can take Corcoran institution. All the inmates mingle and run into each other. They explain what's happening. A lot of officers at Corcoran institution used to take Mexican and black inmates and release them to the yard together and isolate them knowing that they was going to [51] fight, and most of these officers were predominantly white officers. This is the reason why I'm saying they support this system because once you keep us housed the way you house us that they can play games with us and put us into situations where we will go at each other, but if we lived in the same cells they couldn't do that to us.

Q Have you ever been to Corcoran?

A No, I haven't.

Q Let me ask you a few more questions here.

MR. HILGER: Could we take like a five-minute recess?

MS. TURNER: Sure.

(Recess was taken.)

BY MS. TURNER:

Q You mentioned conspiracy between the defendants. Can you tell me what facts you base that conspiracy — your allegation on?

A Well, considering it's against the directors of — or former directors of CDC, conspiracy is based on that they administer or oversee the institutions, and they had knowledge or should have known that the wardens in various different institutions was practicing this type of housing procedure, and they had to agree upon it and allow it to continue.

[52] Q So you are speculating on this; is that correct?

A I'm just looking at the supervisory role.

Q You mention that there is higher compensation and overtime paid during racial crises?

A Yes.

Q You think that Mr. Gomez or Mr. Rowland prefer there to be racial crises for the reason of higher compensation?

A Well, I mentioned that to say why the problem hasn't been eradicated or they haven't followed the court order is that during a racial crisis like that the officers get higher wages doing overtime, stuff like that that would keep them over, so, you know, it's a benefit.

Q What is the overtime they would get? For doing what?

A Maintaining peace and security of the institution.

Q Wouldn't everybody just be locked down and so it would be very quiet?

A Well, if you have to go over your eight hours, you get paid for it.

Q So you think a lock down would put you over your eight hours?

[53] A If you get off at 2:00 and the riot happened at 1:00, it might take you until 4:00 or 5:00 or longer to do everything.

Q So you are just speculating about that as a possibility?

A No, experience.

Q What experience do you have in that?

A Of seeing stuff that happens where it causes officers to do overtime and get higher wages.

Q . You think that they want that to happen? They want a racial crisis?

A I'm not saying that. I'm saying that's why they haven't complied with the court order.

Q The court order, did you have any reflection as to what court order that might be?

MR. HILGER: Objection. Asked and answered.

BY MS. TURNER:

Q I thought maybe you might have been able to come up with some additional information.

MR. HILGER: Not in that room over there.

BY MS. TURNER:

Q Now, do you have any injuries that you are claiming at all?

A The injuries that I'm claiming is the stress that I'm under and the fact that I lose sleep. I would [54] like to talk to somebody about this to help me deal with the situation that I'm in. The medications that I have been placed on —

Q What medications were those?

A I believe — the only one I can remember is Haldol.

Q Did that help you?

A No.

Q You have a job in the prison; is that correct? You work on the work crew?

A Yes.

Q You are able to go to your job?

A Yes.

Q Do you like your job?

A No.

Q What job do you like?

A There is no job here I think I like.

Q You don't care for any of them; is that correct?

A (No audible response.)

Q Are you able to go to the library if you need to?

A Yes.

Q Now, when did you first start having mental health problems? You mentioned, I think, in that [55] chrono you were on Ritalin as a child. Do you recall that at all?

A Yes.

Q Did you have some mental health problems as a child?

A I was hyperactive.

Q Have you had mental health problems since then continuously or do you feel that you've had —

A Well, I haven't had no mental health problems as far as this until I came in here. The only thing I was given Ritalin for was to keep me from being hyperactive.

Q So you are saying it started when you came to prison?

A Yes.

Q Were your expectations of prison different than what they ended up being?

A I didn't have no expectations.

Q You had no expectations. Did you appeal your criminal sentence?

A Yes.

Q Did you lose that appeal or is it still ongoing?

A I lost it.

Q You are seeking punitive damages against the [56] defendants, Mr. Rowland and Mr. Gomez. Why are you seeking punitive damages, if you know?

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A Well, as I said earlier, I believe they are responsible.

Q Why do you believe they should pay you money?

A Due to the suffering that I have been subjected to for the numerous years.

Q How many 602s have you filed since you've arrived at prison? Would you know?

A A lot of them.

Q So you are comfortable with filing them if a problem occurs?

A Yes.

Q You know how to write them, in other words?

A Yes.

Q Is there any reason you elect not to file a 602 for the problems you are claiming in this complaint?

A The only thing I could recall when this issue first came up is that I know there was no possible way that they was going to allow me to live in a cell with someone else based on the way they was doing things, so there was no need.

[57] Q But you never asked; correct?

A I knew that they wouldn't do it.

Appendix E

Q But isn't it correct you never asked?

A That's the reason I never asked.

MR. HILGER: Asked and answered.

BY MS. TURNER:

Q But you really haven't answered the question.

MR. HILGER: He has answered the question. You've asked it more than once.

BY MS. TURNER:

Q You've never asked —

MR. HILGER: Asked and answered.

BY MS. TURNER:

Q — isn't that correct?

A There was no possible way.

MR. HILGER: He answered.

BY MS. TURNER:

Q So you disagree with the responses of the interrogatories; is that correct?

MR. HILGER: Objection.

MS. TURNER: He didn't read them. Okay.

Q I can't really think of any more questions that I can ask at this point. Maybe your attorney is going to ask some questions. I'm going to go ahead and conclude.

Are you going to ask any questions?

MR. HILGER: I just have one follow-up [58] question — actually a couple of questions.

EXAMINATION

BY MR. HILGER:

Q What does the word "privileged" mean to you?

A Privilege means when somebody gives you something that they can take away from you, like a gift or something.

Q Earlier you were asked whether you thought it was a privilege to be housed with people of only your race and you said yes. What did you mean by that?

A I meant that it don't matter what color you is, if you white, black, Mexican, Hispanic, you come into the system and you are confined in a cell based on your race, that's a privilege. It's saying it's all right to be segregated and continue to be segregated. If you take away that privilege, we don't have the segregation housing anymore.

Q To you is a privilege a good thing or a bad thing?

A It's a bad thing.

MR. HILGER: I guess that's it.

[59] FURTHER EXAMINATION

BY MS. TURNER:

Q I have a question on that. What privilege group are you in?

A What do you mean by that?

Q Are you in privilege group A? B? C?

A A.

Q What does privilege group A mean? What do you get as being in privilege group A?

A I think you get something like a quarterly package, and you can spend a certain amount of money in the canteen or something like that, that you can't do if you don't have a privilege group A.

Q Is that a good or bad thing to be in privilege group A?

A Well, when you put it that way, that's semantics there. I guess it would be good. In that context it would be good.

Q So you would want to be in privilege group A, correct, because you would get quarterly packages?

A Yeah.

Q And you can spend money in the canteen?

A You can have something your way or what you like, yes.

MS. TURNER: I have no more questions.

[60] MR. HILGER: So a privilege can either be a good thing or a bad thing?

THE WITNESS: Exactly.

MS. TURNER: The court reporter is going to prepare a transcript of this deposition and is going to send the original to me with a copy to your attorney, or vice versa.

MR. HILGER: Send it to me. I will send it to him for signature and get it back to you.

MS. TURNER: Could you get it back to us within 30 days? That's pretty much the time.

MR. HILGER: Assuming prison mail —

MS. TURNER: Or less if you get it faster. Prison mail is the same as any mail.

Do you wish to add anything to your deposition today?.

THE WITNESS: No, ma'am.

MS. TURNER: Then the deposition is concluded and the court reporter is relieved of her duties.

(Time noted: 11:55 a.m.)

APPENDIX F — MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION ESTABLISHING LIABILITY ON THE SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND THE THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS) DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION ESTABLISHING LIABILITY ON THE SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND THE THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS, DATED MAY 7, 2001

[Filed concurrently with Notice of Motion and Motion by Plaintiff Garrison Johnson for Summary Adjudication, Statement of Uncontroverted Facts and Conclusions of Law, and Declaration of Jeff Garcia Hilger]

Appendix F

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

[Tables of Contents and Authorities Intentionally Omitted]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Garrison Johnson is an individual of African American decent who has been living in institutions controlled by the California Department of Corrections ("CDC") for the past sixteen years. Throughout that time, he has never been placed in a cell with anyone other than another African American. This is so because the CDC determines where a prisoner is housed upon arrival at a CDC-run institution based upon that prisoner's race or ethnic background. (That practice is referred to below as the CDC's "Initial Placement Practice.")

In 1995, Johnson filed suit against the State of California and its Department of Corrections[1] challenging the CDC's

1. The named defendants are former CDC directors James Gomez and James Rowland and current CDC director Steven Cambra. (*See* Fed. Rule of Civil Procedure 25(d)(1).) All three are being sued in their individual capacities for monetary damages. In addition, Cambra is being sued in his representative capacity for injunctive relief. Although the CDC is not a named defendant, it will be referred to as a "defendant" in this motion because its policies are in issue and because Cambra is being sued in his representative capacity as the CDC director.

practice of segregating prisoners by race or ethnicity upon their arrival at CDC-controlled institutions.

In the Complaint now before the Court, Johnson seeks damages and injunctive relief on three claims for relief: (1) cruel and unusual punishment in violation of the 8th Amendment, (2) violations of the equal protection clause of the 14th amendment, and (3) conspiracy to deprive a person of equal protection of the law under 42 U.S.C. § 1985(3). The discovery conducted in this action establishes that the CDC follows a practice of segregating prisoners by race or ethnicity upon their arrival at CDC-controlled facilities and that none of the CDC's so-called justifications for this practice can withstand judicial scrutiny. Accordingly, in this motion for Summary Adjudication, Johnson asks the Court to enter an order adjudicating that the CDC, through its past and present directors, is liable for violation of his right to equal protection and that the named defendants are personally liable on the third claim for relief for conspiracy to violate such right.

II. PROCEDURAL HISTORY AND BASIS FOR MOTION

In February 1995, Johnson, acting *pro per*, filed his original Complaint in this action. Subsequently, that Complaint was amended. In January 1998, the district court dismissed the Third Amended Complaint without leave to amend, and Johnson appealed. Thereafter, on March 21, 2000, the Ninth Circuit issued an order reversing in part the district court's dismissal. [Exhibit A to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. A"), 207 F.3d 650, 653.]

The Court of Appeals noted that Johnson's claims, "[a]lthough inartfully stated . . . are sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." [Ex. A, 655.] The Court observed that "Johnson in essence alleges that a policy of racial segregation in housing has been enforced on him and other inmates throughout the prison system for over a decade. He alleges that the wardens are aware of the deleterious effects of race-based housing, that the practice serves no legitimate penological purpose, and that the practice persists. . . ." [Ex. A, 655.] Finally, the Court held that the "district court erred in dismissing this aspect of Johnson's complaint. . . . The district court also erred in dismissing Johnson's § 1985(3) conspiracy claim with prejudice. . . . [T]he complaint here contains more than a bare allegation of conspiracy, and additional facts in support of the alleged conspiracy may develop as Johnson proceeds with discovery on his equal protection claim." [Ex. A, 655.]

When the case was remanded to the district court, the Proskauer firm agreed to represent Johnson on a pro bono basis. Thereafter, the Complaint was amended once again and discovery proceeded.

The Court of Appeals was correct in its prediction that through discovery Johnson might develop additional facts to support his claims. The testimony of the current director of the CDC, the testimony of the warden of the Lancaster prison in which Johnson currently resides, as well as the form used by CDC representatives when they first assign prisoners to cells, all confirm that during the entire time Johnson has been in its custody and continuing to this day, the CDC has

followed a practice of segregating prisoners by race or ethnicity when they arrive at CDC-controlled facilities.

III. STATEMENT OF FACTS

Plaintiff Garrison Johnson, an African American, has been incarcerated and living within institutions controlled by the CDC since 1986. [Deposition of Garrison Johnson, Exhibit B to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. B"), 17:10-11, 22-23, 22:17-18, 24:5-7.] During that entire sixteen year period, the CDC always has placed Johnson in cells with other African Americans. [Ex. B, 39:7 - 40:17.] Throughout that time Johnson also has observed that every person of another race or ethnicity (e.g. Caucasian, Asian, or Latino) consistently has been placed in cells with persons of that same race or ethnicity. For example, a white prisoner always will be placed with another white prisoner, and a Mexican inmate always will be placed with another Mexican inmate. [Ex. B, 43:5-13.]

Both Associate Warden Linda Schulteis, the CDC official in charge of cell assignments at the institution in which Johnson is currently housed, and Steven Cambra, the current Director of the CDC, have admitted in deposition that the CDC uses race as a primary factor in determining where new inmates will be housed. The CDC requires that if a new prisoner is going to be placed into a cell with another prisoner, then the two must be of the same race or ethnicity. [Deposition of Linda Schulteis, Exhibit C to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. C"), 21:9-20, 22:10-16, 39:15-21; Deposition of Steven Cambra,

Exhibit D to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. D"), 28:15-17; 29:4-5, 39:2-5.]

That testimony is supported by the form (CDC-135) the CDC uses when initial placement determinations are made. This form provides only three pieces of information: Name/ Number, Security/Custody Level, and **Ethnicity/Race**. [Ex. C, 38:13-14; Exhibit E to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. E").] CDC control sergeants, the CDC personnel who make actual cell assignments, use the information provided on the CDC-135 form to determine where prisoners will be housed. [Ex. C, 38:8-14, 21-22; 39:3-6, 15-21.] Because there are legitimate reasons for having a prisoner's name/number and knowing his or her security/custody level when making cell assignments, the CDC-135 speaks for itself in revealing that race/ethnicity is the primary (indeed, the sole) discretionary factor in determining cell housing decisions. [Ex. E.]

The CDC designated Associate Warden Schulteis as the person most knowledgeable at the California State Prison – Lancaster (where plaintiff Garrison Johnson currently is housed) regarding cell housing assignment policies and procedures. In her deposition, she described the CDC's Initial Placement Practice:

> A: Initially we will look for – if we have a black inmate, we're going to look for an empty house that's got no inmates in it or a house that has one black inmate in it.

Q: Why would you look for one with a black inmate?

A: If you have a black inmate that you're trying to house, you generally put them with another black inmate. If you have a white inmate you're trying to house, you generally put them with a white inmate. [Ex. C, 21:12-20.]

. . . .

Q: Why as a practice do you put a black with a black and a white with a white?

A: Or a Hispanic with a Hispanic.

Q: Or a Hispanic with a Hispanic.

A: My whole career we've done that. My whole entire 24 years with the Department it is what the Department has done. [Ex. C, 22:10 - 16.]

Schulteis also described the Initial Placement Practice as it relates to dormitory housing:

Q: How is race used in those dorms in terms of separation?

A: The way the beds are laid out, they have double bunks and triple bunks. And the stack will be either black, white, Hispanic, or blacks with others, white with others, or Hispanic with others. You'll have a black bed, a white bed, and a Hispanic bed. That's

the ideal situation. . . . [Ex. C, 33:13 - 20.]

Director Steven Cambra reaffirmed that the CDC employs a practice of using race as a factor to segregate its inmates:

Q: What factors are taken into consideration in determining who [a newly arrived inmate's] cellmate is going to be?

. . . .

A: Well, what I would do, you know, is I consider their ethnicity, I consider their, you know, custody. . . . [Ex. D, 28:15-17; 29:4-5.]

. . . .

Q: Is it ever likely that someone would not necessarily be housed with someone of their same race on initial placement in an institution?

A: No. That would be the practice. [Ex. D, 39:1 - 5.]

The CDC deponents attempted to give justifications for the CDC's unconstitutional practices:

Q: . . . in the 25 years you've been with the Department, there's been no change in terms of integration of prisons in terms of the Department's policies toward integration?

A: Towards celling, putting inmates in cells, no, there has not been any change in the practice. . . . To make a move to house whites with blacks, blacks with Hispanics, you know, across the board would cause great problems in this institution. It would cause violence. It would cause us more problems than is even imaginable because of their strong feelings about who they have to live with and who they have to spend an inordinate amount of time in such a really small space. [Ex. C, 27:1 - 28:24.]

Schulteis also tried to justify the CDC's practice when she was questioned concerning the cell assignments of prisoners whose ethnicity was listed as "other." Focusing on Asians, she said:

A: Asians are also classified as "others." And with the Asian population, the control sergeants have to be more careful than they do with whites, blacks, and Hispanics because, for example, you cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it. The same with Laotians, Vietnamese, Cambodians, Filipinos. You have to be very careful about housing other Asians with other Asians. It's very culturally heavy. [Ex. C, 32:20 - 33:4.]

Director Cambra also attempted to justify the CDC's Initial Placement Practice of segregating prisoners by race based on fears that racial confrontation and violence would

occur if the CDC were to change its practice and integrate its cells:

Q: Can you explain a little bit about why you would take ethnicity into consideration?

A: Well, I don't want to be charged with setting inmates up to be injured, and in the prison society, if I – if I just take two inmates and have total disregard for their ethnicity and say, "Okay. You're white and you're black. I'm going to put you into this cell together. Have a nice day," I feel I am putting myself in a position that I could be charged with setting up one of them to be injured, because in our prison society, inmates tend to associate along ethnic lines and along their – their own race. . . . [Ex. D, 29:12-23.]

Although the CDC deponents claimed that the justification for the CDC practice of cell segregation is based on fear of violence, the CDC was unable to provide in discovery in this action any evidence to support that position. This was perhaps most telling in the CDC's explanation of why it would not place persons of different races or ethnicities in the same bunk. Associate Warden Schulteis explained:

A: We could not house a black inmate and put a white inmate on top of him.

Q: Why?

A: That would cause problems. That would cause a lot of problems.

Q: But they can be right next to each other?

A: They can be next to each other, but they cannot be on top of each other.

Q: And –

A: It would cause a fight right on the spot.

Q: And how do you know this?

A: It's happened.

Q: You have done – in your experience?

A: Yes. Mistakes have been made. That would be titled a grievous error on the part of a control sergeant to do something like that.

Q: Has that happened in your experience at this prison?

A: Not at this prison, but at CCI it has

Q: And would there be a report of the grievous error in that situation?

A: . . . If anything it would have been a letter of contact, which only lasts in the supervisory file for 90 days. . . .

Q: Is this practice written down?

A: I don't believe so. I have never seen it written down. [Ex. C, 34:5 - 35:13.]

Director Cambra confirmed the absence of reported or recorded incidents of violence resulting from a decision being made to integrate a cell:

Q: . . . [H]ave there ever been any situations where two inmates of two different races were celled together and problems resulted because of it?. . . .

A: Well, I can't – I can't recall too many situations where inmates of opposite races were celled together and there was a problem, no.

Q: Can you recall any such situation?

A: No. Not specifically, no. [Ex. D, 32:19 - 33:5.]

. . . .

Q: Would it be fair to say that in those eight or nine years [of performing managerial duties for the CDC], if there had been incidents of violence or other problems resulting from a cell housing decision dealing with a white being put with a black, or a white being put with a Mexican, or some interracial housing decision, that you would have heard about it?

A: Well, we receive all incident reports, so if it was – if it was an assault, you know – in other words, if it was a crime that resulted in some injury, yes. [Ex. D, 33:23 - 34:6.]

In sum, Associate Warden Schulteis and Director Cambra described the CDC's unvarying practice of segregating by race/ethnicity when housing assignments are made. In addition, they attempted to explain the CDC's "justifications" for why people of different races and/or ethnic backgrounds cannot live together in confined quarters. One of their primary justifications was that cell or bunk integration would lead to violence. However, they failed to point to a single incident of violence following any cell integration attempt. Schulteis had only one vague memory of an incident at another institution for which the paperwork could not possibly be found. Additionally, she expressly admitted that no violence of this type had occurred at the Lancaster institution where plaintiff Johnson is housed.

Although the CDC claims to have a "compatibility" practice in place that allows prisoners to request to switch cellmates, that practice does not regularly allow for members of different races to share cells. Plaintiff Johnson testified that he did understand that if he found a "compatible" cellmate, he could request a cellmate switch. However, he never believed that he could request a cellmate who was not African American.[2] [Ex. B, 40:12-17, 41:24 - 43;24.]

2. Although Johnson was informed at his deposition that he "could have" requested a cell mate of a different race, that was the first time he was presented with such information, and it was contrary to everything he had observed in his 16 years at CDC-controlled facilities.

Johnson has observed that the only exceptions to the CDC's Initial Placement Practice occur when the CDC has to find a place to house prisoners that it has labeled as "other." Examples of "other" include Asians and Native Americans. Johnson has observed that, on occasion, a person labeled as "other" may be housed with a person not classified as "other."

Apart from those limited exceptions, however, Johnson has never seen anybody of one ethnicity placed into a cell with somebody of a different ethnicity. For example, he has never seen a Caucasian person placed with an African American, or an African American person placed with an Asian. Johnson bases his observations on his sixteen years of experience as a prisoner within the CDC system. [Ex. B, 40:3-7.]

Johnson believed that CDC officials would never grant a request by an African American inmate such as himself to be housed with a prisoner of a different race because he understood that the CDC was enforcing a policy or practice that prohibited integration of persons of different races or ethnicities within CDC cells. Johnson also believed and still believes that the CDC's policy or practice leads to increased racial tension and increased racial rioting stemming from these tensions. He therefore seeks entry of an Order by this Court invalidating that practice.

Appendix F

VI. PLAINTIFF IS ENTITLED TO SUMMARY ADJUDICATION ON THE ISSUES OF LIABILITY BECAUSE THE CDC, UNDER THE DIRECTION OF THE DIRECTOR DEFENDANTS, HAS EMPLOYED AND CONTINUES TO EMPLOY A PRACTICE OF RACIAL SEGREGATION IN VIOLATION OF THE UNITED STATES CONSTITUTION. AND NO MATERIAL FACTS ARE IN DISPUTE REGARDING THOSE VIOLATIONS

Summary adjudication or partial summary judgment is appropriate when, as here, there is no genuine issue of material fact as to a particular claim or claims, and the Court can enter an Order that defendants are liable to plaintiff for monetary damages and/or injunctive relief, the specifics of which will be determined at a trial on damages. Fed. Rule of Civil Procedure 56(a).

The CDC is, of course, an agency of the State. Race-based decision making on behalf of a State directly violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The fact that more than one CDC official has acted to implement the CDC's practice makes such actions a conspiracy to deprive plaintiff of the equal protection of the law under 42 U.S.C. § 1985(3). The State of California, acting through the past and present CDC directors, has no legally cognizable justification for employing its racially-based Initial Placement Practice. Accordingly, plaintiff is entitled to entry of judgment in his favor on the issue of defendants' liability on the second and third claims for relief.

Appendix F

A. *The CDC's Initial Placement Practice Violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution*

The undisputed evidence in the record of this case establishes that the CDC has an Initial Placement Practice of segregation on the basis of race or ethnicity such that when prisoners arrive at a CDC-controlled facility, they are assigned to a bed or a cell based on (1) their gender, (2) their custody level, and (3) their race or ethnic background. The first two categories are permissible under the law; the third category is not.

The Fourteenth Amendment of the Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has repeatedly held that this protection extends to prison inmates: The Fourteenth Amendment prohibits racial discrimination within prisons, and that prohibition extends to racial segregation of inmates. *Lee v. Washington*, 390 U.S. 333 (1968); *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Turner v. Safely*, 482 U.S. 78, 84 (1987).

Lee and *Cruz* recognized that "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'" *Lee*, 390 U.S. at 334; *Cruz*, 405 U.S. at 321. Later decisions interpreting those Supreme Court cases have concluded that generalized fears of violence do not justify maintaining a policy of racial segregation like that practiced by the CDC in this case.

B. *Segregation of Prisoners by Race Cannot be Justified by a Generalized Desire to Avoid the Possibility of Racial Confrontation and Violence*

The justifications for racial segregation advanced by Schulteis and Cambra on behalf of the CDC are similar to the explanations given- and rejected – by the wardens at the Louisiana State Penitentiary (Angola) and the Columbus Correctional Facility in Columbus, Ohio in the cases of *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994) and *Stewart v. Rhodes*, 473 F. Supp. 1185 (D.C. Ohio, 1979).

In *Sockwell*, the Court of Appeals expressly held that a general policy of racially segregating two-person cells at the Angola penitentiary violated prisoners' rights to Equal Protection, despite the warden's contention that security and discipline concerns demanded such segregation. The Court explained that "a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation. . . . If violent disruptions did occur [as a result of cell housing integration,] we would expect the prison officials to take appropriate action against the offending prisoners, black or white." *Sockwell*, 20 F.3d at 191. The court ultimately decided that any segregation to prevent racial violence must be based on individualized analysis. *Id.*

In *Stewart,* the Ohio prison superintendent testified that the practice of segregation in that institution "stems from the prison administration's desire to reduce the possibility of racial tension and potential violence which it fears will result from celling black and white inmates together. . . . [Because [the prison] is the initial reception center, . . . the

administration has insufficient information concerning the [prisoner's] background to integrate them in the two-man reception cells where officials fear racial bias might flair into violence." *Stewart*, 473 F. Supp. 1187-88.

The court there held that the foregoing purported justification violated the Constitution:

> The Court is fully cognizant of the problems with which prison administrators, faced with increasing prison populations and decreasing space and funding, must deal. Further, it is clear that federal courts must defer in many matters to the expert judgment of these administrators, particularly in matters of internal security and order. The Supreme Court recently firmly reiterated this principle:
>
> > [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520 (1979).

On the other hand, it is equally clear that prisoners are not stripped of all constitutional rights at the

> prison gate. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). The Court must strike a proper balance. . . . Although defendants contend that . . . the practice of segregation . . . [is] necessary for institutional security, the Court is not persuaded that such measures are in fact required to preserve internal order and discipline or to maintain institutional security.

The court also noted that "[i]t is clear that segregation by cell is no more permissible than segregation on a broader basis, for example by block." *Id.* at 1189, fn. 4. That finding sheds light on the following "justification" advanced by Director Cambra:

> Q: Why then – if the CDC has an anti-segregation policy and is interested in helping the prisoners to eliminate their own racial hatred, why, then, does the department continue to condone, you know, not putting someone of one race with someone of another race in – in the cells, particularly in light of the fact that you are not aware of any incidents of violence that have occurred based on such a decision. [Ex. D, 51:18 - 25.]
>
> A: I would answer that by saying that in the areas on the yard and the work areas, and what have you, the staff have much better visibility and observation in those areas to intercede if there is a problem, as opposed to that cell. It is two individuals, door closed. Out of sight, out of mind. And – and that's a pretty risky situation. [Ex. D, 52:18-24.]

Cambra's vague fears of violence, not based on any particular incidents, but rather on the belief that all black and white prisoners housed together, all Chinese and Japanese prisoners housed together, all black and Hispanic prisoners house together, etc. will do each other violence, place him and the CDC's purported justifications squarely within the rulings of *Sockwell* and *Stewart*. Just as such justifications failed in *Sockwell* and *Stewart,* they fail here. Plaintiff is entitled to entry of judgment invalidating the CDC's Initial Placement Practice.

C. *Defendants' Actions Have Violated Johnson's Civil Rights.*

It has long been recognized that a civil rights action pursuant to 42 U.S.C. § 1983 and § 1985(3) is a proper remedy for a state prisoner to make a constitutional challenge to the conditions of prison life and obtain appropriate damages. *See, e.g., Wilson v. Nevada Dep't. of Prisons,* 511 F. Supp. 750 (D.C. Nev. 1981). In *Sockwell* the Fifth Circuit was quick to conclude that the very same acts that deprived the segregated prisoner plaintiffs in that case of their Constitutional right to equal protection similarly violated 42 U.S.C. § 1983. *See, Sockwell*, 20 F.3d at 192. The same is true here. Accordingly, plaintiff Johnson is entitled to entry of judgment adjudicating the liability of the current and former CDC Director defendants.

Appendix F

V. CONCLUSION

The undisputed evidence establishes that without adequate justification, the California Department of Corrections segregates inmates by race or ethnicity when they are assigned to housing upon arrival at CDC-controlled institutions. Such segregation is unconstitutional. Plaintiff Johnson's Motion for Summary Adjudication regarding the issue of liability on the second and third claims for relief should be granted. A trial on the remaining issues of damages and injunctive relief on those claims for relief and on all issues presented by the first claim for relief should be set for the very near future.

DATED: April 9, 2001

Respectfully submitted,

PROSKAUER ROSE, LLP
BERT H. DEIXLER
JEFF GARCIA HILGER

By: s/ Jeff Garcia Hilger
JEFF GARCIA HILGER
Attorneys for Plaintiff
GARRISON JOHNSON

APPENDIX G—STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS) DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS)

[Filed concurrently with Notice of Motion and Motion for Summary Adjudication, Memorandum of Points and Authorities in Support thereof, and Declaration of Jeff Garcia Hilger]

Appendix G

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

After consideration of (1) the papers in support of and in opposition to plaintiff's motion for summary adjudication of liability issues on the second and third claims for relief, and (2) the oral argument of counsel, the Court determines that the following facts have been established as,

UNCONTROVERTED FACTS

1. Garrison Johnson has been living in institutions controlled by the California Department of Corrections ("CDC") since 1986. [Deposition of Garrison Johnson, Exhibit B to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. B"), 17:10-11, 22-23 and 22:17-18.]

2. Garrison Johnson is an individual of African American descent. [Ex. B, 24:5-7.]

3. When Garrison Johnson arrived at the first CDC institution to which he was assigned, he was told that he had to be placed in a "black cell." [Ex. B, 39:8-10.]

4. When Garrison Johnson arrived at the first CDC institution to which he was assigned, he was told that in any CDC prison to which he was assigned, he would be placed in a cell based on his skin color. [Ex. B, 39:19-21.]

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5. Garrison Johnson has never had any cellmate who was not of African American descent. [Ex. B, 39:7 - 40:17.]

6. CDC control sergeants are responsible for assigning new prisoners to cells. They use form CDC- 135 to make inmate bed assignments. [Deposition of Linda Schulteis, Exhibit C to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. C"), 38:8 - 39:21.]

7. Form CDC-135 lists an inmate's name, ethnicity and custody level. [Ex. C, 38:13-14; Exhibit E to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion, ("Ex. E").]

8. For at least the past 24 years, the CDC's custom and practice has been to place a new inmate of one racial or ethnic background into a cell with an inmate of the same racial or ethnic background. [Ex. C, 21:9-20, 22:10-16, 39:15-21; Deposition of Steven Cambra, Exhibit D to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. D"), 28:15-17; 29:4-5; 39:2-5.]

Based on the foregoing Uncontroverted Facts, the Court now makes its

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action, pursuant to 28 U.S.C. § 1331.

2. Segregation of individuals by race in prisons violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. [*Lee v. Washington*,

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390 U.S. 333, 334 (1978); *Cruz v. Beto*, 405 U.S. 319, 321(1972); *Turner v. Safely*, 482 U.S. 78, 84 (1987).]

3. General fears of violence are not a legal justification for segregation of prisoners by race. [*Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1187 (D.C. Ohio 1979).]

4. The CDC's initial placement practice that segregates inmates based on their race or ethnic background violates the Equal Protection Clause of the United States Constitution.

5. The present and former Directors of the CDC, acting in their individual capacities, and the present Director of the CDC, acting in his representative capacity, are liable for monetary damages and/or injunctive relief to be determined at a trial on damages because the CDC initial placement practice that they have implemented violates prisoners' rights to Equal Protection of the laws. 42 U.S.C. § 1985(3).

DATED: April 9, 2001

PROSKAUER ROSE, LLP
BERT H. DEIXLER
JEFF GARCIA HILGER

By: s/ Jeff Garcia Hilger
JEFF GARCIA HILGER
Attorneys for Plaintiff
GARRISON JOHNSON

APPENDIX H — DECLARATION OF JEFF GARCIA HILGER IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM OF RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS) DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

DECLARATION OF JEFF GARCIA HILGER IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM OF RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS)

[Filed concurrently with Notice of Motion and Motion by Plaintiff Garrison Johnson for Summary Adjudication, Memorandum of Points and Authorities in Support Thereof, and Statement of Uncontroverted Facts and Conclusions of Law]

Appendix H

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

DECLARATION OF JEFF GARCIA HILGER

I, JEFF GARCIA HILGER, declare as follows:

I. I am an attorney at Proskauer Rose LLP, counsel for Plaintiff Garrison Johnson and am duly admitted to practice before all courts of the State of California and this Court. The facts stated herein are personally known to me and I could and would testify competently thereto if called upon as to do so.

2. Attached as Exhibit A is a true and correct copy, provided by Westlaw, of the Ninth Circuit's opinion in *Garrison Johnson v. State of California, et al.*, 207 F.3d 650 (9th Cir. 2000)

3. Attached as Exhibit B are true and correct copies of relevant excerpts of deposition testimony of Garrison Johnson taken on October 5, 2000.

4. Attached as Exhibit C are true and correct copies of relevant excerpts of deposition testimony of Linda L. Schulteis taken on December 6, 2000.

5. Attached as Exhibit D are true and correct copies of relevant excerpts of deposition testimony of Steven Cambra taken on March 2, 2001.

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6. Attached as Exhibit E is a true and correct copy of CDC form CDC-135 as provided to me by California's Deputy Attorney General Sara Turner.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed April 9, 2001 at Los Angeles, California.

s/ Jeff Garcia Hilger
JEFF GARCIA HILGER

Appendix H

EXHIBIT A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 98-55302

Submitted Oct. 8, 1999.[1]

Garrison S. JOHNSON,

Petitioner-Appellant,

v.

STATE OF CALIFORNIA; James H. Gomez, Director, Department of Corrections; James Rowland,

Respondents-Appellees.

Filed March 21, 2000

Appeal from the United States District Court for the Central District of California; Kim M. Wardlaw, District Judge, Presiding. D.C. No. CV-95-01192-KMW.

Before: FLETCHER, D.W. NELSON, and BRUNETTI, Circuit Judges.

1. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a); 9th Cir. R. 34-4.

Appendix H

PER CURIAM.

Appellant, Garrison Johnson, is a prisoner incarcerated in the State of California. He filed the instant suit claiming that the California Department of Corrections ("CDC") violated his constitutional rights by segregating inmates according to race and extorting money from inmates by overcharging for telephone use. This is an appeal from the district court's order granting the State's motion to dismiss on grounds that the action is time-barred and otherwise fails to state a claim.

I. FACTS AND PROCEDURAL HISTORY

Garrison Johnson filed the instant suit pro se, asserting causes of action under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. Johnson's primary allegations are (1) that between 1987 and 1991, the former Director of the Department of Corrections, James Rowland, instituted and enforced a policy of housing inmates according to race, and (2) that warden Rowland was engaged in a conspiracy to extort money from inmates through charges for telephone calls. The same allegations are made against the current Director, James Gomez, for the period covering 1991 to the present. Johnson contends that these actions violated his right to due process under the Fifth Amendment, his right to be free from cruel and unusual punishment under the Eighth Amendment, and his right to due process and equal protection of the laws under the Fourteenth Amendment. He seeks damages and declaratory relief.

Johnson filed his original complaint on February 24, 1995. After a series of amendments in response to motions to dismiss, Johnson filed a Third Amended Complaint. The State again moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure and the district court adopted a report and recommendation from the magistrate judge dismissing the case with prejudice. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse in part and affirm in part.

II. STANDARD OF REVIEW

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998). All factual allegations of the complaint are accepted as true and all reasonable inferences must be drawn in favor of the nonmoving party. *See id.*; *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987). Moreover, "[t]he Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.1987) (citing *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982)), and we have emphasized that the rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.1992) (citing *Eldridge*, 832 F.2d at 1137).

Dismissal on statute of limitations grounds is a question of law reviewed de novo. *See Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir.1998).

III. DISCUSSION

A. Statute of Limitations

Because § 1983 does not contain a statute of limitations, federal courts apply the forum state's statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In California, the applicable statute of limitations is one year. *See Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir.1994); Cal.Civ.Proc.Code § 340(3).[2]

When not inconsistent with federal law, we also apply the law of the forum state regarding tolling. *See Hardin v. Straub*, 490 U.S. 536, 537-39, 543, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir.1988). However, federal law controls the question of when a claim accrues. *See Elliott*, 25 F.3d at 801-02. Under federal law, a claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action. *See Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir.1996).

Prior to the enactment of § 352.1(a) of the California Code of Civil Procedure on January 1, 1995, prisoners serving less than a life sentence could toll claims for their entire sentence. *See Elliott*, 25 F.3d at 802. Under § 352.1(a), however, the tolling period is limited to two years. The report

2. A one year statute of limitations also applies to actions under 42 U.S.C. §§ 1981, 1985 and 1986. *See Taylor v. Regents of the Univ. of California*, 993 F.2d 710, 711-12 (9th Cir.1993); *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir.1991).

and recommendation ("R & R") of the magistrate judge held that all claims in the complaint against former warden Rowland are time- barred. He reasoned that Johnson's causes of action accrued at least by 1991, and that even with the two year tolling provision for prisoners in Cal.Civ.Proc.Code § 352.1(a) added to the one year statute of limitations, his claims were time barred in 1994.

The district court failed to consider whether § 352.1(a) can be applied retroactively to plaintiffs whose causes of action accrued before January 1995. In *Fink v. Shedler,* 192 F.3d 911 (9th Cir.1999), the Ninth Circuit answered this retroactivity question. After considering an analogous issue under Arizona law raised in *Tworivers v. Lewis,* 174 F.3d 987, 993 (9th Cir.1999), as well as the implications of giving § 352.1(a) either complete retroactive or exclusively prospective effect, the court adopted a middle course. We held that "claims ... that accrued before January 1, 1995 are tolled for two years from accrual, or until January 1, 1995, *whichever occurs later,* as long as such an application does not result in manifest injustice." *Fink,* 192 F.3d at 916 (emphasis added) (citing *Tworivers,* 174 F.3d at 995-96; *Parker,* 975 F.Supp. at 1272). Under the rule in *Fink,* Johnson's claims against warden Rowland are timely since they are tolled until January 1, 1995, and he filed suit on February 24, 1995, well within the one year statute of limitations.[3]

---

3. Although state tolling rules do not apply to Johnson's § 1986 claim, *see Donoghue v. County of Orange,* 848 F.2d 926, 930 n. 3 (9th Cir.1987), the federal equitable tolling doctrine may. *See Ellis v. City of San Diego,* 176 F.3d 1183, 1189 n. 3 (9th Cir.1999). (Cont'd)

B. Merits

As to both warden Rowland and warden Gomez, the R & R concluded that Johnson failed to state a claim upon which relief could be granted. More specifically, the magistrate judge found that the complaint impermissibly relied on conclusory allegations despite three opportunities to amend, guidance from the court as to what must be alleged, and specific admonitions regarding the heightened pleading standard set forth in *Branch v. Tunnell* for constitutional torts involving an element of intent. *See Branch,* 14 F.3d 449, 452, 455-56 (9th Cir.1994) (holding that plaintiffs " 'must

---

(Cont'd)
On remand, Johnson should be given the opportunity to allege when he became aware of the facts supporting his § 1985 conspiracy claim. *See infra,* section III.B.1. This will permit the district court to determine whether the § 1986 claim is saved under the equitable tolling doctrine.

In his opposition to warden Rowland's motion to dismiss, Johnson states that "Rowland misrepresented the issue of racial segregational housing by misleading plaintiff to believe that he did not have a constitutional right not to be segregated and plaintiff did not discover the misrepresentation until 1994." Assuming the complaint is amended on remand to incorporate this allegation, the district court should also consider whether the doctrine of equitable estoppel applies. *See Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959) (defendant may be estopped from asserting statute of limitations where plaintiff's delay in filing was caused by reliance on defendant's misrepresentations as to governing law), *cited and followed in, American Pipe & Const. Co. v. Utah,* 414 U.S. 538, 559, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity.'") (quoting and reaffirming *Branch v. Tunnell,* 937 F.2d 1382, 1386 (9th Cir.1991)). The State urges that we affirm on the same grounds.

1. Racial discrimination

According to well established precedent, "[p]risoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race." *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (citing *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968)); *see also Turner v. Safley,* 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (noting that "federal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). More specifically, "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'" *Cruz v. Beto,* 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam) (quoting *Lee,* 390 U.S. at 334, 88 S.Ct. 994).

Johnson's Third Amended Complaint makes the following allegations in support of the claim that Rowland

and Gomez enforced a policy of racial segregation in inmate housing:

> (1) that the wardens confined Johnson to a two-man cell "upon the basis of his skin color," and that this caused him to be subjected to racial assault by other inmates;
>
> (2) that Rowland and Gomez authorized the wardens of other California prisons to segregate inmate housing according to race, ("segregatively confining 'Blacks' in a two-man cell only therefore, prohibiting Black inmates from being 'celled' with 'White' or 'Mexican' inmates");
>
> (3) that this housing segregation policy was not related to a legitimate penological interest and caused racial tension and riots among different ethnic groups;
>
> (4) that Rowland and Gomez were aware that racially dividing inmates "breed [s] enmity and racial tension," but have an interest in enforcing the segregation policy "because prison officials are paid higher wages during a racial crisis that involve[s] inmates rioting"; and
>
> (5) that the wardens have failed to institute procedures to eradicate the policy, despite a 1994 "federal order to stop housing inmates based on their color or ethnicity; but rather place them in the first available cell."

Although inartfully stated, these allegations are sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Johnson in essence alleges that a policy of racial segregation in housing has been enforced on him and other inmates throughout the prison system for over a decade. He alleges that the wardens are aware of the deleterious effects of race-based housing, that the practice serves no legitimate penological purpose, and that the practice persists despite a court order in 1994 to house inmates in a race-neutral manner. He even identifies a potential motive for the segregation policy. The district court erred in dismissing this aspect of Johnson's complaint.

The district court also erred in dismissing Johnson's § 1985(3) conspiracy claim with prejudice. Although "[a] mere allegation of conspiracy without factual specificity is insufficient," *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 626 (9th Cir.1988), the complaint here contains more than a bare allegation of conspiracy, and additional facts in support of the alleged conspiracy may develop as Johnson proceeds with discovery on his equal protection claim. With leave to amend, Johnson may also be able to state a claim for violation of his Eighth Amendment rights insofar as his personal safety has been jeopardized by defendants' policy of racial segregation. *See Helling v. McKinney,* 509 U.S. 25, 31, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) ("the treatment a prisoner receives and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment"); *Toussaint v. McCarthy,* 801 F.2d 1080, 1107 (9th Cir.1986) (prison officials must provide prisoners with "personal safety" since it is a "basic human need"); *Hoptowit*

v. Ray, 682 F.2d 1237, 1250 (9th Cir.1982) ("Prison officials have a duty to take reasonable steps to protect inmates from physical abuse"; holding that excessive level of violence among inmates constitutes cruel and unusual punishment) (citing *Ramos v. Lamm,* 639 F.2d 559, 572 (10th Cir.1980)).

However, Johnson's due process claims were properly dismissed with prejudice. Because the Equal Protection Clause covers the actions challenged in the complaint, Johnson may not proceed on a substantive due process theory. *See Patel v. Penman,* 103 F.3d 868, 874 (9th Cir.1996). Nor is a procedural due process claim cognizable where the existence of an unconstitutional policy (segregated inmate housing), rather than the procedure which leads to it, is challenged.

2. Overcharging for Telephone Use

Johnson alleges that Respondents conspired with telephone companies to overcharge inmates in exchange for "kickbacks." He claims that a comparison of phone bills reveals that "phone calls plaintiff made to [friends and family members] cost them . . . more than a non-incarcerated person who made a call from the same area where plaintiff is incarcerated." As a result of the overcharging, he claims that his mother's phone service was canceled and she now has a mandatory "block" on the phone preventing her from making calls to the prison.

Although prisoners have a First Amendment right to telephone access, this right is subject to reasonable limitations arising from the legitimate penological and administrative

interests of the prison system. *See Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir.1986). There is no authority for the proposition that prisoners are entitled to a specific rate for their telephone calls and the complaint alleges no facts from which one could conclude that the rate charged is so exorbitant as to deprive prisoners of phone access altogether. Instead, Johnson admits in the complaint that his mother lost phone service in large measure because of a failure to pay the charges for high frequency use, not just rates for prison calls. Moreover, Johnson's conspiracy allegations are quintessentially vague and conclusory. The district court properly dismissed this aspect of the complaint with prejudice.

IV. APPOINTMENT OF COUNSEL

Although Johnson's complaint states cognizable claims, clarity and legal precision are wanting. The case will undoubtedly proceed more efficiently and effectively if Johnson has legal representation. Accordingly, on remand the district court shall request the appointment of pro bono counsel pursuant to 28 U.S.C. § 1915(a).

V. CONCLUSION

The judgment of the district court is affirmed in part and reversed in part. On remand, Johnson shall be granted leave to amend his complaint following the appointment of counsel.

AFFIRMED IN PART AND REVERSED IN PART. Each party shall bear their own costs.

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192
CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

vs.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

DEPOSITION OF
GARRISON S. JOHNSON
LANCASTER, CALIFORNIA
OCTOBER 5, 2000

* * *

[commencing at page 17] Q Local jails?

A L.A. County jail.

Q Always the same then?

A Yeah.

Q And the youth authorities; is that correct?

A I've never been in a youth authority.

Q Never been in a youth authority institution; is that correct?

A That's correct.

Q So when were you first incarcerated on your present sentence then?

A In '97.

Q Then you were housed in CIM for a reception period; is that correct?

A Yes.

Q Then did you go to Folsom after that?

A Yes, I did.

Q Then after Folsom where did you go?

A To Calipatria.

Q Did you say in your present sentence it was '97 or did you say '87?

A I made a mistake. I meant '86.

Q '86, okay. Why did you transfer from Folsom?

A I think it was a voluntary thing. They asked the inmates did they want to go to Calipatria. It was

* * *

[22] Q I'm not aware of any policy. I mean, I have never located one. And I am just wondering if you had -- you indicated you've never seen one?

A So are you saying there is no policy?

Q Well, I'm not saying that. I don't know. But so far we've never been able to come up with a policy.

A I haven't read one.

Q You have not. Okay. I thought maybe you might have something. Have you read Title 15?

A Yes, I have.

Q So it's certainly not the source of your policy; correct?

A That's correct.

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Q Let me ask you about your education. Did you graduate from high school?

A No.

Q Have you been getting some education while you've been here in prison since '86?

A Yep.

Q What level have you achieved would you say towards graduation from high school?

A Well, I attempted to take my GED one time. I got up to where I registered in 10th grade.

Q Approximately 10th grade then?

A Yeah.

* * *

[24] A Probably four to five different races in the system.

Q Four to five different races?

A Uh-huh.

Q What race are you a member of?

A The African-American.

Appendix H

Q The African-American race. Now, you mentioned a practice of housing inmates based solely on their race. Would you say that is one of your complaints?

A Yes, I would.

Q Can you tell me what that practice is?

A Yes. That practice is simply how inmates are housed based on the color of their skin. They put you in cells -- if you are black, they look for a cell that has a black person. If you are white, they look for a cell that has a white person. They match you up based on your color.

Q From among those four to five races?

A Yeah. If you're Asian, they are going to look for an Asian. They classify Asians and Samoans as others, so they will look for a cell with the classification of others and they put you in there.

Q You talked about compatibility. Had you ever heard of a practice of housing people based on compatibility?

* * *

[39] A Yeah.

Q Let me get back to my train of thought here. Did you ever request to cell with somebody of a different race who you were compatible with?

A I don't believe I did, no.

Q Why not?

A I was never asked did I want to cell with another race or anything like that. All I know is that when I first came into the system they told me they had to find me a black cell.

Q Who is "they"?

A Whoever the officers are that do the cell assignments when you come into the system.

Q Do you know the officer's name?

A It's been so many years ago when I first came in. I couldn't tell you.

Q So this was when you first arrived at the prison?

A When I first arrived. They said any prison you go to they look for a cell for you based on your skin color.

Q But you did say you could house with anyone who you were compatible with of any race?

MR. HILGER: Objection. Misstates his testimony. He didn't say that.

[40] BY MS. TURNER:

Q If you wanted to house with someone of a different race, you could: isn't that correct?

A I don't have no problem with housing with any color, any ethnicity, different race. No problem.

MR. HILGER: When you are asking if he could, I think he is understanding it in a general sense as to whether he would be able to get along. Not whether he would be able to within the system. I think that question is unclear.

BY MS. TURNER:

Q Okay. So within the California Department of Corrections, if you wanted to house with somebody of a different race than you are, would your request be granted provided both of you agreed to it?

A I don't have no idea whether it would be granted.

Q If you read the interrogatory responses they indicate that that's the system of how they seek to find compatible cell mates.

A So what you are trying to tell me is that you have to ask to be in a cell with a different race if you wanted to live with a different race; otherwise, they just put you in a cell based on the color of your skin?

Appendix H

[41] Q Well, it's my understanding that the key would be finding someone you're compatible with, period.

A Well, if I'm compatible with someone of my same race. But when you come into the system they don't ask you whether or not you are compatible. What they say is I've got to find you a cell based or your race, and that's where they put you in your cell. You don't find out that you are not compatible with a person until they put you up in here and you all are not on the same wavelength, you all don't see things clearly, you're arguing, then you go tell the person that controls the cells that we can't get along, and that's what incompatibility is all about. We can't get along. Then they try to tell you to go find somebody else that you can get along with.

Q Do you think that's unreasonable?

A I don't know whether it's unreasonable or not.

MR. HILGER: That's sort of vague. When you say "that," I'm not sure what you are referring to.

BY MS. TURNER:

Q That seems to me what you are describing to be your understanding of the practice then?

A Yes.

Appendix H

Q Do you think that's an unreasonable practice to try to find somebody whom you are compatible with?

[42] A It depends. If they are only going to allow you to house or be in a cell with somebody just your race -- if I tell them I'm not compatible, they expect me to go find somebody else black and try to find compatibility. If I go find somebody white or Mexican or another color and you tell them that me and this guy get along and we want to cell, I don't believe they would let us cell together.

Q Now, what you are saying is you don't believe it, but you've never asked that; is that correct?

A No, I never -- see, that's what I'm saying. The whole system is designed where you house you don't know you are compatible until you get in there. If they house me in a cell with different races, I would know who I can live with. I would know who I could be compatible with other races.

Q But you meet people out in the yards or you meet people through 13 years living in the same place.

A Well, if you've got a system that's been operating like this for I don't know how long, and other inmates -- everything is racially segregated. You can't go to a white guy and say, "Hey, man, I want to move with you." You can't cross the races. That will start the racial tension right there. So I know that I can't go to a white guy and say, "Hey, I want to [43] move with you" because he is not going to move with

Q What if he wants to move with you?

A I'm saying the system creates this.

Q What if he wants to move with you?

A Well, if he wants to move with me, we have got to try to move together.

Q So it would work then; correct?

A It should work.

Q It does, doesn't it?

A No, because you don't see it nowhere. You can go right here in this institution and you won't see no black and white, no black and Hispanic. You won't see it like that.

Q How about Hispanic and white?

A I don't know about that.

Q How about white and Asian?

A I don't know about that.

Q How about Asian and Hispanic?

A I don't know about that, but you won't -- the thing is if you want to be realistic about it, all the other races get along except the blacks. So when it comes to a black issue

and you want to live in a cell with one of them, you won't never see nothing like that. You won't never see it.

Q Well, you know, maybe you haven't seen it, but

* * *

[56] defendants, Mr. Rowland and Mr. Gomez. Why are you seeking punitive damages, if you know?

A Well, as I said earlier, I believe they are responsible.

Q Why do you believe they should pay you money?

A Due to the suffering that I have been subjected to for the numerous years.

Q How many 602s have you filed since you've arrived at prison? Would you know?

A A lot of them.

Q So you are comfortable with filing them if a problem occurs?

A Yes.

Q You know how to write them, in other words?

A Yes.

Appendix H

Q Is there any reason you elect not to file a 602 for the problems you are claiming in this complaint?

A The only thing I could recall when this issue first came up is that I know there was no possible way that they was going to allow me to live in a cell with someone else based on the way they was doing things, so there was no need.

Q But you never asked; correct?

A I knew that they wouldn't do it.

Appendix H

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192 CBM
(BOR)

GARRISON S. JOHNSON, AN INDIVIDUAL,

PLAINTIFF,

VS.

STATE OF CALIFORNIA; JAMES H. GOMEZ, AN INDIVIDUAL; JAMES ROWLAND, AN INDIVIDUAL; AND DOES 1 THROUGH 20, INCLUSIVE,

DEFENDANTS.

DEPOSITION OF: LINDA L. SCHULTEIS

TAKEN ON: WEDNESDAY, DECEMBER 6, 2000

• • •

[commencing at page 21] WORK FOR THE INMATE AND THEN THE SAME PROCESS STARTS AGAIN.

IF THE INMATE IS TO BE MOVED OFF OF THAT PARTICULAR FACILITY TO ANOTHER FACILITY THAT

WOULD GIVE HIM A BETTER PROGRAM THAN WAS OFFERED ON THE ONE WHERE HE WAS ALREADY ON, HE HAS TO BE PLACED IN A CELL IN AN EMPTY BED, PERHAPS WITH ANOTHER INMATE OF THE SAME RACE.

Q. OKAY. WHY --

A. THAT'S WHAT YOU'RE GETTING AT IS HOW DO WE PLACE THEM?

Q. YEAH.

A. AND INITIALLY WE WILL LOOK FOR -- IF WE HAVE A BLACK INMATE, WE'RE GOING TO LOOK FOR AN EMPTY HOUSE THAT'S GOT NO INMATES IN IT OR A HOUSE THAT HAS ONE BLACK INMATE IN IT.

Q. WHY WOULD YOU LOOK FOR ONE WITH A BLACK INMATE?

A. IF YOU HAVE A BLACK INMATE THAT YOU'RE TRYING TO HOUSE, YOU GENERALLY PUT THEM WITH ANOTHER BLACK INMATE. IF YOU HAVE A WHITE INMATE YOU'RE TRYING TO HOUSE, YOU GENERALLY PUT THEM WITH A WHITE INMATE.

WE ALSO AS A PRACTICE WILL LOOK AT THE AGE AND TRY TO MATCH THE INMATE -- SAY A 40-YEAR-OLD INMATE WITH A 35 TO 45-YEAR-OLD INMATE. IF WE HAVE A 19-YEAR-OLD INMATE OR

20-YEAR-OLD INMATE, WE WILL TRY TO MATCH THEM WITH ANOTHER 19-YEAR-OLD, 20-YEAR-OLD INMATE.

[22] WE ALSO LOOK AT GANG AFFILIATION. NOW, IF AT CLASSIFICATION WE SEE THAT THIS PARTICULAR INMATE IS OF A GANG AFFILIATION THAT HE'S HOUSED WITH SOMEBODY THAT'S A TOTAL OPPOSITE, IF HE HASN'T BEEN BROUGHT TO THE ATTENTION OF STAFF TO BE MOVED OUT OF THAT PARTICULAR HOUSE BEFORE CLASSIFICATION, CLASSIFICATION WILL STRONGLY RECOMMEND THAT THEY BE MOVED. BUT IF THEY'RE GETTING ALONG AND THEY ARE HAPPY, THEY'RE COMPATIBLE, WE DON'T MAKE A MOVE.

Q. OKAY. I UNDERSTAND THE GANG AFFILIATION CONCERN. I UNDERSTAND THE AGE CONCERN. WHY AS A PRACTICE DO YOU PUT A BLACK WITH A BLACK AND A WHITE WITH A WHITE?

A. OR A HISPANIC WITH A HISPANIC.

Q. OR A HISPANIC WITH A HISPANIC.

A. MY WHOLE CAREER WE'VE DONE THAT. MY WHOLE ENTIRE 24 YEARS WITH THE DEPARTMENT IT IS WHAT THE DEPARTMENT HAS DONE.

WE HAVE IN THE PAST, AND VERY RECENT PAST, HOUSED A HISPANIC INMATE WITH A BLACK

INMATE. AND THE ONLY REASON WE DID THAT WAS BECAUSE THE INMATES REQUESTED IT. THE HISPANIC INMATE WAS RAISED WITH CRIPS, A BLACK GANG. THIS INMATE WAS AN INMATE OF THE 99TH STREET MAFIA CRIPS. HE WAS NOT COMFORTABLE LIVING WITH HISPANICS AND HE MOVED IN WITH A BLACK INMATE AND IT WORKED.

BUT IN ANY OF MY EXPERIENCE IN THE DEPARTMENT, TO HOUSE A BLACK INMATE WITH A WHITE INMATE OR A BLACK INMATE

* * *

[24] THE CHAMBRAY SHIRT AND THE JEANS, THEY WILL IDENTIFY THEMSELVES BY THE WAY THEY CUT THEIR HAIR, BY -- ON THE FACILITY THAT I RAN, WE DISCOVERED THAT THEY WERE USING THE STATE PENS WITH THE COLOR ON THE TOP OF THE PEN. THAT'S A BLUE PEN IS A CRYPT. A RED ONE IS A BLOOD. THEY DISTINGUISH THEMSELVES. AND THE HOUSING UNIT STAFF CAN READILY IDENTIFY THEM JUST BY LOOKING AT THEM.

SOME INMATES WHEN THEY TAKE ALL THEIR PROPERTY AND THEY GO TO THAT CELL WHEN THEY'RE FIRST MOVING IN, THEY'LL IDENTIFY THAT PERSON AS AN ENEMY. THEY MAY NOT KNOW THAT ENEMY'S NAME, BUT THEY KNOW HIM BY FACE THAT HE CAN'T CELL WITH THAT PERSON. THEN STAFF IMMEDIATELY HAVE TO TAKE ACTION TO MOVE THAT PERSON TO ANOTHER YARD, AT

LEAST ANOTHER HOUSING UNIT. BUT IT'S THE INMATES THEMSELVES THAT HAVE MOVED THE DEPARTMENT IN THAT DIRECTION.

NORTHERN HISPANIC INMATES CANNOT EVEN COME TO A SOUTHERN INSTITUTION. WE IMMEDIATELY -- WHEN WE SEE THAT AN INMATE IS FROM CALIFORNIA AVENUE IN BAKERSFIELD AND ABOVE, IF THAT'S WHERE HE WAS BORN AND RAISED, HE CAN'T WALK THE YARD IN GENERAL POPULATION HERE. AND THE INMATE SAYS NOTHING TO STAFF. HISPANIC INMATES WON'T SAY ANYTHING. THE STAFF ARE RESPONSIBLE TO REVIEW THE FILE AND REALIZE THAT THIS INMATE CANNOT BE HOUSED HERE.

Q. WHEN YOU SAY HE CAN'T WALK THE YARD, WHY IS THAT?

* * *

[27] Q. SO TO THE BEST OF YOUR KNOWLEDGE IN THIS 25 YEARS YOU'VE BEEN WITH THE DEPARTMENT, THERE'S BEEN NO CHANGE IN TERMS OF INTEGRATION OF PRISONS IN TERMS OF THE DEPARTMENT'S POLICIES TOWARDS INTEGRATION?

A. TOWARDS CELLING, PUTTING INMATES IN CELLS, NO, THERE HAS NOT BEEN ANY CHANGE IN THE PRACTICE.

Q. HOW ABOUT ANY OTHER --

A. YES, THERE HAS BEEN A CHANGE. THERE HAS BEEN A CHANGE IN -- FOR EXAMPLE, CMF VACAVILLE IN THE '70S THE INMATES -- AGAIN, LIKE I SAID, IT'S A CULTURAL TYPE EVOLUTION PROCESS.

THE BLACK GUERILLA FAMILY, WHICH IS A BLACK INMATE FACTION, AT CMF RAN THE TRASH CREW. AND THAT MEANT THAT THEY WOULD TAKE A DUMPSTER, YOU KNOW, THROUGH THE ENTIRE LENGTH OF THE PRISON, WHICH IS BETTER THAN A QUARTER MILE, AND PICK UP ALL THE GARBAGE FROM THE HOUSING UNITS ALL THREE FLOORS OF THIS ENTIRE INSTITUTION.

THE ARYAN BROTHERHOOD OR THE BIKERS, HELL'S ANGLES, HAITIANS, INDIVIDUALS LIKE THAT, HAD CONTROL OF THE KITCHEN, AND SPECIFICALLY THE SCULLERY, WHICH IS WHERE A LOT OF WEAPONS WERE MANUFACTURED FROM. THEY HAD CONTROL OF THAT. THE HISPANIC INMATES HAD CONTROL OF THE LAUNDRY. EACH RACE HAD ITS OWN AREA THAT THEY COMPLETELY CONTROLLED.

WHEN WORK INCENTIVE CAME ON LINE IN THE [28] EARLY '80S, IT WAS NECESSARY AT THAT POINT, AND AFTER THE DEATH OF CORRECTIONAL OFFICER PATCH AT VACAVILLE, TO BREAK UP THESE CLICKS, SO TO SPEAK. AND EACH JOB ASSIGNMENT

THEN WAS SUPPOSED TO BE ETHNICALLY BALANCED. AND IT WAS VERY DIFFICULT TO DO BECAUSE THE INMATES ARE A STRONGHOLD CULTURALLY. AND IT STILL IS NOT POSSIBLE IN SOME AREAS TO BREAK, YOU KNOW, TO ETHNICALLY BALANCE ALL OF THE DIFFERENT AREAS. IT DEPENDS ON THE PRISON, THE POPULATION THAT'S MADE UP OF THE PRISON OR THE NEEDS OF THE INMATES.

Q. OKAY. SO THAT PROGRAM HAS BEEN PARTIALLY SUCCESSFUL, THEN?

A. YES.

Q. NOT COMPLETELY SUCCESSFUL?

A. YES, IT IS.

Q. AND THE ASPECTS OF IT, WHICH IN YOUR OPINION HAVE NOT BEEN SUCCESSFUL, WOULD BE ONE OF THE REASONS WHY CELL ASSIGNMENTS, INTEGRATION HAS NOT BEEN TAKEN ON?

A. TO MAKE A MOVE TO HOUSE WHITES WITH BLACKS, BLACKS WITH HISPANICS, YOU KNOW, ACROSS THE BOARD WOULD CAUSE GREAT PROBLEMS IN THIS INSTITUTION. IT WOULD CAUSE VIOLENCE. IT WOULD CAUSE US MORE PROBLEMS THAN IS EVEN IMAGINABLE BECAUSE OF THEIR STRONG FEELINGS ABOUT WHO THEY HAVE TO LIVE WITH AND WHO THEY HAVE TO SPEND AN

INORDINATE AMOUNT OF TIME IN SUCH A REALLY SMALL SPACE.

NOW, TO INTEGRATE IN THE JOB ASSIGNMENTS, TO

* * *

[32] Q. -- SERGEANT TO SERGEANT?

A. YES.

Q. BUT IT'S NEVER -- IF IT IS SOMEWHERE IN THIS MANUAL, IT'S NOT RELIED UPON; WOULD THAT BE CORRECT? I MEAN - -

A. UH-HUH.

Q. THAT WOULD BE CORRECT?

A. UH-HUH.

NOW, IN HOUSING INMATES IT ISN'T SET IN STONE THAT THIS HOUSE HERE, BED 217 UP AND DOWN IS A BLACK CELL OR A WHITE CELL OR A HISPANIC CELL BECAUSE OUR COUNT VARIES FROM, YOU KNOW, DAY TO DAY, WEEK TO WEEK, MONTH TO MONTH ON HOW MANY BLACK, HISPANIC, WHITE INMATES YOU HAVE.

AND WE HAVE INMATES THAT ARE CLASSIFIED AS "OTHERS." THESE ARE INMATES, FOR EXAMPLE,

FROM BELIZE OR CUBA. THEY LOOK BLACK, BUT THEY ARE NOT CLASSIFIED AS BLACKS WHEN THEY COME TO THE DEPARTMENT. THEY'RE CLASSIFIED AS "OTHERS."

Q. WHAT ABOUT ASIANS?

A. ASIANS ARE ALSO CLASSIFIED AS "OTHERS." AND WITH THE ASIAN POPULATION, THE CONTROL SERGEANTS HAVE TO BE MORE CAREFUL THAN THEY DO WITH BLACKS, WHITES, AND HISPANICS BECAUSE, FOR EXAMPLE, YOU CANNOT HOUSE A JAPANESE INMATE WITH A CHINESE INMATE. YOU CANNOT. THEY WILL KILL EACH OTHER. THEY WON'T EVEN TELL [33] YOU ABOUT IT. THEY WILL JUST DO IT. THE SAME WITH LAOTIANS, VIETNAMESE, CAMBODIANS, FILIPINOS. YOU HAVE TO BE VERY CAREFUL ABOUT HOUSING OTHER ASIANS WITH OTHER ASIANS. IT'S VERY CULTURALLY HEAVY.

Q. OKAY. DO YOU HAVE DORMS AT THIS PRISON?

A. WE HAVE TWO DORMS -- ACTUALLY, THREE DORMS. WE HAVE THE MINIMUM SUPPORT FACILITY THAT HOUSES 300 INMATES. AND WE HAVE THE B GYM, WHICH HOUSES BETWEEN 120 AND 150 INMATES AND THOSE ARE BASICALLY LEVEL ONES, LEVEL TWOS CLOSE TO BEING LEVEL ONES, MINIMUM -- I MEAN MSF -- NOT MSF -- THE COMMUNITY CORRECTIONAL FACILITY INMATES

THAT GET INTO TROUBLE COME TO THAT PARTICULAR GYM.

Q. HOW DO THE RACES -- HOW IS RACE USED IN THOSE DORMS IN TERMS OF SEPARATION?

A. THE WAY THE BEDS ARE LAID OUT, THEY HAVE DOUBLE BUNKS AND TRIPLE BUNKS. AND THE STACK WILL BE EITHER BLACK, WHITE, HISPANIC, OR BLACKS WITH OTHERS, WHITE WITH OTHERS, HISPANIC WITH OTHERS. YOU'LL HAVE A BLACK BED, A WHITE BED, AND A HISPANIC BED. THAT'S THE IDEAL SITUATION.

BUT BECAUSE OUR BLACK POPULATION IS HEAVIER THAN EITHER THE HISPANIC OR THE WHITE, IT'S POSSIBLE TO HAVE TWO BLACK BUNKS TOGETHER THAN A WHITE AND A HISPANIC.

Q. AND THOSE PEOPLE ARE ALL IN THE SAME GENERAL AREA BECAUSE THEY'RE LOWER SECURITY?

[34] A. YES.

Q. AND THEY DON'T HAVE THE SAME KIND OF RACIAL PROBLEMS THAT YOU WOULD IMAGINE THAT WOULD HAPPEN IN A CELL?

A. WE COULD NOT HOUSE A BLACK INMATE AND PUT A WHITE INMATE ON TOP OF HIM.

Q. WHY?

A. THAT WOULD CAUSE PROBLEMS. THAT WOULD CAUSE A LOT OF PROBLEMS.

Q. BUT THEY CAN BE RIGHT NEXT TO EACH OTHER?

A. THEY CAN BE NEXT TO EACH OTHER, BUT THEY CANNOT BE ON TOP OF EACH OTHER.

Q. AND --

A. IT WOULD CAUSE A FIGHT RIGHT ON THE SPOT.

Q. AND HOW DO YOU KNOW THIS?

A. IT'S HAPPENED.

Q. YOU HAVE DONE -- IN YOUR EXPERIENCE?

A. YES.

MISTAKES HAVE BEEN MADE. THAT WOULD BE TITLED A GRIEVOUS ERROR ON THE PART OF A CONTROL SERGEANT TO DO SOMETHING LIKE THAT.

Q. HAS THAT HAPPENED IN YOUR EXPERIENCE AT THIS PRISON?

A. NOT AT THIS PRISON, BUT AT CCI IT HAS.

Appendix H

Q. CCI. WHERE IS CCI?

[35] A. TEHACHAPI, UP THE HILL.

Q. AND WOULD THERE BE A REPORT OF THE GRIEVOUS ERROR IN THAT SITUATION?

A. PROBABLY A 115 ON BOTH OF THE INMATES FOR FIGHTING, BUT I'M NOT SURE IF A CONTROL SERGEANT WAS DOCUMENTED. IF ANYTHING IT WOULD HAVE BEEN A LETTER OF CONTACT, WHICH ONLY LASTS IN THE SUPERVISORY FILE FOR 90 DAYS.

Q. OKAY. IS IT -- IS THIS PROCEDURE --

A. PRACTICE.

Q. IS THIS PRACTICE WRITTEN DOWN?

A. I DON'T BELIEVE SO. I HAVE NEVER SEEN IT WRITTEN. DOWN.

AND THE REASON I SAY THAT IS BECAUSE I HAD AN OCCASION WHERE I FELT A CONTROL SERGEANT WAS NOT PERFORMING TO MY EXPECTATIONS. AND WHEN I TRIED TO DOCUMENT THE CONTROL SERGEANT REGARDING, YOU KNOW, POLICY AND PROCEDURE, AND IT'S NOT RELATED TO HOUSING INMATES, I FOUND THAT THERE WERE NO PROCEDURES IN WRITING FOR CONTROL SPECIFICALLY.

Appendix H

WE NOW HAVE POST ORDERS WHICH DEFINE TO THE SERGEANT HOW TO DO COUNTS, HOW TO DO RADIO CHECKS, ELECTRICAL CURTAILING, YOU KNOW, THE NUTS AND BOLTS OF THE JOB, BUT NOT REGARDING HOUSING.

Q. OKAY. I'M NOT -- I UNDERSTAND YOUR ANSWER, BUT . . .

* * *

[38] Q. JUST BY BUNK?

A. JUST BY BUNK.

Q. YOU'VE ALREADY TOLD ME A LITTLE BIT ABOUT THE PRACTICE FOR ASSIGNING BED ASSIGNMENTS. I'D LIKE FOR YOU JUST TO GIVE ME A LITTLE MORE DETAIL AND JUST GO THROUGH SORT OF A CHRONOLOGY OF FROM THE TIME THEY GET OFF THE BUS TO THE TIME THAT THEY'RE -- IF THEY'RE GOING TO BE HERE LET'S SAY FIVE YEARS, WHAT'S THE CHRONOLOGY FROM THE TIME THEY GET OFF THE BUS TO THE TIME THEY GET TO THE BED THEY'RE PRETTY MUCH GOING TO STAY IN IF THEY DON'T HAVE A PROBLEM?

A. THE CONTROL GETS A LIST FROM THE R & R SERGEANT, WHICH IS THE CDC-135. AND THE 135 LISTS THE INMATE'S NAME, RACE, AND CUSTODY. ALSO IT WILL LIST IF THAT INMATE HAS A SPECIALIZED PROGRAM NEED, FOR EXAMPLE

EOP ENHANCED OUTPATIENT, MENTAL -- YOU KNOW, THEY HAVE SOME MENTAL PROBLEMS AND THEY NEED TO GO TO THAT PARTICULAR PROGRAM, WHICH IS ALSO ON FACILITY D. IT'S VERY SIMPLE TO HOUSE THOSE PARTICULAR INMATES THAT ARE ALREADY EARMARKED FOR SPECIAL PROGRAMS. WE KNOW WHAT HOUSING UNIT THEY GO TO.

THEN WHAT THE CONTROL SERGEANT NEEDS TO DO IS LOOK AT WHAT KIND OF EMPTY BEDS ARE AVAILABLE ON BRAVO YARD, PARTICULARLY HOUSING UNIT B-1, WHICH IS THE ORIENTATION UNIT. THE ORIENTATION UNIT HOUSES ALL OF THE INMATES THAT COME, YOU KNOW, TO THE INSTITUTION FOR [39] GENERAL POPULATION. THEY ARE SEEN BY THE COMMITTEE WITHIN 10 DAYS, 14 DAYS OF THEIR ARRIVAL.

AND AT THAT POINT THE CC-1, CORRECTIONAL COUNSELOR 1, CAN INDICATE ON -- IT'S A REGULAR SHEET THAT GIVES THE HOUSING UNIT SERGEANTS THE NAME, NUMBER, AND RACE OF THE INMATE. AND IF THERE'S A PARTICULAR FACTION, GANG FACTION, THEN THEY WILL ALSO PUT THAT THERE ON THE SIDE SO THAT THE SERGEANT HAS A CLUE AS TO WHAT GANG AFFILIATION THIS INMATE HAS. IF THEY'RE NONAFFILIATED, THEY PUT NA, OF COURSE.

THEN THE BRAVO UNIT SERGEANT HAS TO MAKE SOME PHONE CALLS AND HE HAS TO PRESENT THESE INMATES TO MOVE THEM OUT OF

ORIENTATION AND THEY HAVE TO MOVE TO MAKE ROOM FOR MORE INMATES COMING IN.

Q. LET ME INTERRUPT FOR A SECOND. HOW IS THEIR BED IN THE ORIENTATION UNIT DETERMINED?

A. IF THERE IS AN EMPTY CELL AND TWO INMATES OF THE SAME RACE CAME IN AT THE SAME TIME, AND THEY APPEAR TO BE COMPATIBLE IN R & R, SAY THEY'RE IN THE SAME TANK, THERE ISN'T A FIGHT, THEN IT'S -- THEY NORMALLY GET HOUSED TOGETHER.

Q. WHAT IF THERE IS AN ODD NUMBER? I MEAN, IF THERE'S THREE BLACKS, A WHITE, AND A HISPANIC, WHERE WOULD THOSE FIVE -- HOW WOULD THOSE FIVE -- OR IF THERE WERE THREE BLACKS, TWO WHITES, AND A HISPANIC, HOW WOULD THEY . . .

* * * *

Appendix H

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192
CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

vs.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

Friday, March 2, 2001

Deposition of

STEVEN CAMBRA

* * *

Appendix H

[commencing at page 28] general population Level 4 and there was a Level 1.

THE COURT REPORTER: I am sorry. There was a psych services unit --

THE WITNESS: General population Level 4 -- psych services unit, general population unit Level 4 and a minimum security unit. So it would depend on the institution -- admission to the institution, and what have you.

Q. Okay. How -- what factors are taken into consideration when -- once it's determined which -- whether -- you know, you mentioned these different areas, Level 3 security, Level 4 security, psych, all these different areas. Once a determination has been made as to which one of these -- I am going to call them areas -- the prisoner is going to, what factors are taken into consideration in determining who -- who his or her cellmate is going to be?

A. The -- the area lieutenant, typically, of that area or the sergeant in that area, depending on, you know, how the facility is set up, would try to make a determination and place people in the cell that were -- that they determined to be compatible as best they could by case factors, maybe by talking to the individuals, and what have you.

Q. Okay. Can you be more specific in terms of . . .

* * *

[29] what -- what you mean by case factors or what -- sort of what the factors are? What -- what is your knowledge as to what the factors are?

A. Well, what I would do, you know, is I consider their ethnicity, I consider their, you know, custody. I would probably talk to the folks, and, you know, I try to consider age a little bit, you know. But the real goal is try to get compatible cell partners.

Q. Okay.

A. I mean, that's pretty straightforward.

Q. The -- the first factor that you mentioned was ethnicity. Can you explain a little bit about why you would take ethnicity into consideration?

A. Well, I don't want to be charged with setting inmates up to be injured, and in the prison society, if I -- if I just take two inmates and have total disregard for their ethnicity and say, "Okay. You're white and you're black. I am going to put you into this cell together. Have a nice day," I feel I am putting myself in a position that I could be charged with setting up one of them to be injured, because in our prison society, inmates tend to associate along ethnic lines and along their -- their own race. So I think that would be very unprudent, unless they came to me and they told me, "Hey, we want to be in the cell together," and then I've got to figure out . . .

* * *

[32] the cell decision was okay.

Q. Okay.

A. I mean, we are talking about cell decisions right now.

Q. Right. That's exactly what we're talking about.

So did that cell decision last? I mean, was it -- did it have to be changed because of the tension, or did it -- was it okay?

A. From what I recall -- I mean, again it's been a long time since I have been involved in the individual cell decision, but the decision at San Quentin with the black inmate that was an EME worked fine. They went out to the -- they had group exercise yards in the security housing unit when the inmates in the security housing unit were housed in San Quentin back in those years, and -- and the inmate did fine on the yard. The inmate did fine in the cell.

Q. Okay. On the opposite end of the spectrum, have -- to the best of your knowledge, have there ever been any situations where two inmates of two different races were celled together and problems resulted because of it?

Do you understand my question?

A. Yeah, I hear you. You are coming at it from the other end?

Appendix H

Q. Yeah.

* * *

[34] dealing with a white being put with a black, or a white being put with a Mexican, or some interracial housing decision, that you would have heard about it?

A. Well, we receive all incident reports, so if it was -- if it was an assault, you know -- in other words, if it was a crime that resulted in some injury, yes.

Q. Okay.

A. If it was, you know, a situation where people became incompatible and begged to get out of the cell, and the local staff took them out, no.

MR. HILGER: Okay. I need to take a quick break. Go off the record.

(Recess taken.)

THE WITNESS: Are we back on the record?

May I clarify one thing --

Q. BY MR. HILGER: Sure.

A. -- I just thought of?

Appendix H

At San Quentin, I mentioned a back inmate that came to San Quentin that was in the EME prison gang, and I had forgotten that when I was there, the Toussaint injunction was in force and they mandated --

THE COURT REPORTER: I am sorry. I had forgotten, when I was there --

THE WITNESS: Okay. I had forgotten, when I was there, the Toussaint injunction was in force, and that . . .

* * *

[36] but the Hispanic inmates tend to ally north and south, and they tend to be at odds with each other.

So, again, if I were to just discount the inmates -- if I were to discount that fact and take an Hispanic inmate from Southern California without any regard or talking to the individual, house him with an Hispanic inmate from Northern California and put them in a cell, then the inmates, knowing how our society works and knowing that I know it, then they would see that as a setup also.

Q. Okay. Have there been -- again, with this question of the inmates complaining about a setup, have there been incidents of inmates complaining of racial setups within your years within --

MS. TURNER: The only question I have is do you mean in the cells or in the yards or in the --

MR. HILGER: In the cells.

Q. I am specifically talking about the cells where -- where you said -- you told me if a warden, or if a, you know, watch commander decided to put a Mexican and an Asian in the same cell, that he could be accused of trying to set up problems. I mean, I gave those ethnicity examples, but -- I think you said a white and a black -- that you could be accused -- he or she could be accused of, you know, setting up a fight, basically.

Have there been such incidents? And then I also [37] asked you if there had been any, you know, violence resulting from such a decision, and I think you said to the best of your knowledge, no. But I'm asking you now if there have been letters -- you said the letters would fly -- if there have been situations where such a determination was made and letters flew.

A. By ethnicity?

Q. Uh-huh.

A. I can't recall it.

Q. Okay. Briefly, going back to this Form 135, Warden Schulteis told me that this is, again, what is used when people get off the bus to determine where they're going to go initially. It includes ethnicity, but it doesn't include gang affiliation. It does have a space for coaments, however. Would gang affiliation be listed under comments, most likely?

A. Sure.

Q. Okay. What are the chances in general of -- of a white inmate being celled with a black inmate on initial placement? Would it be zero percent?

A. Pretty close to it.

Q. Okay.

MS. TURNER: The only objection I am going to make is are you -- you know, are you asking about for every prison including some of the women's facilities, I mean, if

[39] I guess basically what I am asking is, Is it ever likely that someone would not necessarily be housed with someone of their same race on initial placement in a situation?

A. No. That would be the practice.

Q. Okay. And that practice is not part of the -- this paper that I haven't seen, the '98 memo? Is that mentioned in there at all? Is race mentioned in this practice -- I mean, in this memo? I'm sorry.

A. I don't believe so. We have to get the memo.

Q. Okay.

A. And we will do so. It -- I believe it speaks to compatibility for sure.

Q. Okay.

A. And it -- and it speaks to exceptions.

Appendix H

Q. Okay.

A. So we best let the memo speak for itself.

Q. Okay. But if the memo doesn't mention race, is it fair to say that the department has an unwritten practice of not celling -- strike that.

Is it safe to say that the department has an unwritten practice of always attempting to place an inmate with a cellmate of their same race?

MS. TURNER: Upon initial placement, you mean?

MR. HILGER: Upon initial placement.

* * *

[51] over my career, it's -- the oversight in that regard definitely has increased --

Q. Okay.

A. -- from what it was in 1970, 1971.

THE COURT REPORTER: From what it was when?

THE WITNESS: 1970, '71.

MR. HILGER: I'm sorry for interrupting.

Appendix H

Q. Based on your testimony, then, there was no specific incident or incidents that led to the increased monitoring. It was just gradually over time?

A. Well, I probably wasn't in a management position then, because it was -- you know, it's been the way it's been for quite a while, so -- so I -- you know, I am sure some enlightened administrator decided that we had to pay more attention to this, maybe because of what they saw out there, but I don't know who the enlightened administrator was or whether it was a bunch of people or what.

Q. Why, then -- if the CDC has an anti segregation policy and is interested in helping the prisoners to eliminate their own racial hatred, why, then, does the department continue to condone; you know, not putting someone of one race with someone of another race in -- in the cells, particularly in light of the fact that you are not aware of any incidents of violence that have occurred based on such a decision? Why doesn't the department begin [52] to do this?

MS. TURNER: Okay. The only objection I am going to make is that kind of misstates his testimony, because he has talked about the compatibility --

MR. HILGER: Okay.

MS. TURNER: -- goal, and then you are talking about --

MR. HILGER: Let me -- I will rephrase.

MS. TURNER: -- you are talking about the initial placement day one.

MR. HILGER: Yeah.

Q. I am talking about the initial placement, the fact that there's a less than a 1 percent chance that if I am going in as a white person, that I am going to be celled with a black person. Why, if the prison is interested in -- in the things that I mentioned, why--does that unwritten practice continue?

A. I would answer that by saying that in the areas on the yard and the work areas, and what have you, the staff have much better visibility and observation in those areas to intercede if there is a problem, as opposed to that cell. It is two individuals, door closed. Out of sight, out of mind. And -- and that's a pretty risky situation, unless the inmates, again, agree to do so.

So I -- I interpret your question as forced, very . . .

* * * *

STATE OF CALIFORNIA

TRANSFER RECORD

CDC 136 (1/91)

DEPARTMENT OF CORRECTIONS

DATE:

TO: (NAME OF RECEIVING INSTITUTION)

ATTENTION:
RECORDS OFFICER

The following identified persons will be transferred this date.

FROM:

TO:

NUMBER	NAME	LEVEL	RTH	COMMENTS

SIGNATURE	TITLE	SENDING INSTITUTION

Receipt of the above-named persons and their records is acknowledged.

SIGNATURE OF TRANSPORTING OFFICER	TITLE	INSTITUTION
SIGNATURE OF RECEIVING OFFICER	TITLE	INSTITUTION

BEST AVAILABLE COPY

APPENDIX I — DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DATED APRIL 9, 2001

[Cover and Tables of Contents and Authorities Intentionally Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

Case: CV-95-01192 CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

Appendix 1

This is an action brought pursuant to 42 U.S.C. § 1983. Plaintiff, Garrison S. Johnson, a state prisoner incarcerated at the California State Prison for Los Angeles County located in Lancaster, California ("CSP-Lancaster"), contends that there has been "invidious discrimination" by the State of California Department of Corrections, its former Directors, James H. Gomez and James Rowland," alleging they are liable for "formulating and implementing a policy and practice of housing inmates based solely on their race." (Fourth Amended Compl., ¶ 1.) Plaintiff contends that this policy has "escalated racial tensions in the prison population, fostered violence and distrust among the prison inmate, and created conditions which have subjected plaintiff to duress, oppressions, and other cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." (*Id.*) Plaintiff also claims a violation of his equal protection rights under the Fourteenth Amendment. (*Id.*) Plaintiff seeks damages and injunctive relief.

Defendants contend that they do not "hous[e] inmates solely on the basis of race." In making housing assignments, the Department of Corrections must look at many factors to make cell assignments. Once having completed the temporary reception center process, the policy of the California Department of Corrections is to permit inmates to find, from among the population, an inmate with whom they are compatible and then the CDC accommodates their requests be housed together.

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STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff is a prisoner in the custody of the California Department of Corrections (the "CDC"). (4th Am. Compl., ¶ 2.)

2. Plaintiff was sentenced to state prison on June 17, 1987, by the Superior Court of the California, County of Los Angeles, for twenty-five years to life in state prison for one count of violation of Penal Code § 187 (murder). Plaintiff also received an additional eleven year consecutive term for four counts of violation of Pen. Code § 213.5 (residential robbery) and one count of violation of Pen. Code § 245(a)(1) (assault with a deadly weapon). (Exh. 1, which is attached to the Declaration of Sara Turner.)

3. Plaintiff was received at the California Institution for Men on June 22, 1997. (Exh. 2.)

4. Plaintiff's classification summary was prepared on July 20, 1987. (Exh. 3.) The document makes no reference to Plaintiff's race. (*Id.*)

5. Defendants Rowland and Gomez are former Directors of the CDC. (Answer, ¶ 4.)

6. Defendant Steven Cambra, sued in his official capacity, is the Acting Director of the CDC. (Declaration of Steven Cambra, hereinafter, Exh. 4, ¶ 1.)[1]

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1. The Department of Corrections has been dismissed by Plaintiff. Defendant S. Cambra, the current Director of the CDC is named in his official capacity. See Rule 25 of the Fed. R. Civ. P.

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7. Plaintiff never had any personal contact with Defendant, Mr. Rowland or Mr. Gomez. (Plaintiff Garrison Johnson's Deposition, attached to Notice of Lodgement, filed and served herewith, page 20: 19-21:9).

8. Inmates are housed double-celled (two inmates per cell) or in dormitories. (Exh. 4, ¶ 4.)

9. Plaintiff's custody level does not qualify him for dormitory housing. (Pl's Dep., p. 44: 20-45: 6.)

10. Plaintiff is housed in a two-man cell at CSP-Lancaster. (Compl., ¶ 9.)

11. Plaintiff's cell-mate is Mr. Stubbs. (Pl's. Dep., p. 18:25-19:1.) Plaintiff cells with Mr. Stubbs because Plaintiff finds they are compatible. (*Id.* at, pp. 19: 10-20: 6.)

12. If Plaintiff found he was compatible with someone of a different race and wanted to house with that person, he could.[2] (Pl's Dep., p. 25: 11-18.)

13. An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to the

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2. By his deposition testimony, Plaintiff's statement that "he could" appears to be in the context that he would be agreeable to it. (See Plaintiff's Dep., p. 25: 11-13.)

inmate's physical, mental and emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests. (Exh. 4, ¶ 5.)

14. The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates with whom he may have had disputes with during previous prison placements. (Exh. 4, ¶ 6.)

15. With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation. (Exh. 4, ¶ 7.)

16. In addition to the factors identified above, race is considered during the initial double-cell housing classification decision. (Exh. 4, ¶ 8.)

17. The reason race is a consideration in an initial housing decision is that, based on CDC's experience, CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that

prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior. (Exh. 4, ¶ 9.)

18. Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else. (Exh. 4, ¶ 10.)

19. If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused. (Exh. 4, ¶ 11.)

20. After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement. (Exh. 4, ¶ 12.)

21. Plaintiff transferred to CSP-Lancaster on March 15, 1994. (Exh. 2.)

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22. At CSP-Lancaster, with respect to the initial housing, if the inmate will be housed in a double-cell, the initial housing is generally done by housing an inmate with another inmate of his same ethnic race. In addition, at CSP-Lancaster, administrators look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group. (Declaration of L. Schulteis, Associate Warden, CSP-Lancaster, hereinafter, Exh. 5, ¶ 5.)

23. At CSP-Lancaster, prison officials also try to house an inmate with an inmate close to his own age. Also, for example, prison officials attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. Prison officials also consider other factors such as enemy concerns, custody level and classification. (Exh. 5, ¶ 6.)

24. At CSP-Lancaster, prison officials make housing decisions in the manner described above because they find that it will be the least likely to lead to conflict among the prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard. (Exh. 5, ¶ 7.)

25. With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. Prison officials attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past. (Exh. 5, ¶ 8.)

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26. As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together. (Exh. 5, ¶ 9.)

27. As to the initial housing assignment, if prison officials at CSP-Lancaster were not to consider race and gang affiliation in the initial double-cell housing decision, there will be conflicts both in the cells and the conflict will flow onto the yards. Although prison officials would prefer the inmate population not focus on these areas in a manner leading to conflict, prison officials find that the inmates do place a weight on the issue. The reason is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells. (Exh. 5, ¶ 10.)

28. At CSP-Lancaster, if prison officials we were to disregard the initial housing placement being done in the manner set forth above, then it is there certainly would be serious violence among inmates. (Exh. 5, ¶ 11.)

29. Prison officials making initial housing decisions at CSP-Lancaster would not knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate or group of inmates' safety by taking steps that they know would result in violence and conflict. As it is a duty of prison officials to preserve the safety and security of the institution, inmates, and staff, and having been given that responsibility, staff would therefore not ignore a known issue impacting safety. (See Exh. 5, ¶ 12.)

30. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race. (Exh. 5, ¶ 13.)

31. Plaintiff was formerly a member of the "Crip" gang. (Pl's Depo., p. 27: 16-24; see also Exh. 3.)

32. Plaintiff appropriately receives meals (Pl's Depo., p. 31: 1:7 and 32: 6-7), medical and mental health care (*Id.*, p. 32: 9-10 and 15-17), shelter (p. 33: 1-4), exercise, sanitation and showers (*Id.*, p. 33: 5-15).

33. Plaintiff has never made a request to cell with a person of a different race. (*Id.*, p. 39: 2-5.)

34. Prior to filing the lawsuit Plaintiff never mentioned to prisoner officials that he wanted to live with somebody of a different race. (*Id.*, p. 45: 9-14.) Plaintiff never filed an inmate appeal on the issues raised in his complaint. (*Id.*, p. 45: 17-18.)

35. Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. (Exh. 4, Cambra Decl., ¶ 13.) If race were to be disregarded entirely, however, there will be problems within the individual cells. These will be problems that the staff will have a difficult time in

controlling. There will be fights in the cells and the problems will emanate onto the prison yards. Prison housing staff are not adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. Because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (*Id.*)

36. Plaintiff, as a prisoner, agrees there is racial tension in the prison. (Pl's. Depo., p. 35: 2-4:)

37. Plaintiff contends he was transferred from a prison prior to a racial riot breaking out. Specifically, he states [referring to Calipatria State Prison]: "[i]f I would have stayed there, I would have been involved in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based on your skin color. I'm Black, and if I was there I would been hurt." (*Id.*, p. 35: 15-23.)

38. Plaintiff says that racial riots occur at CSP-Lancaster. (*Id.*, p. 36: 14-19.)

Appendix I

ARGUMENT

I.

SUMMARY JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Avila v. Traveler's Insurance Co.*, 651 F.2d 658, 660 (9th Cir. 1981). While the burden of proof rests on the moving party, *Belt Travel Service, Inc. v. International Air Transport Assoc.*, 620 F.2d 1360, 1364 (9th Cir. 1980), the opposing party must contradict any factual assertions in movants' affidavits or they will be accepted as true. *Avila* at 660. The burden of producing evidence sufficient to negate a motion for summary judgment rests upon the party having the burden of proof at trial, in this case, the Plaintiff. Absent such a showing, the "moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In a civil rights action, the Plaintiff must demonstrate the deprivation of a federally protected right. *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986); *Havas v. Thornton*, 609 F.2d 372, 374 (9th Cir. 1979). Where there is no allegation of facts which show the violation of a federally protected right, Defendants are entitled to prevail

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as a matter of law. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). The moving party is not required to produce evidence showing the absence of genuine issues of material fact on issues for which the non-moving party has the burden of proof. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.1989).

Based on the facts and evidence in this case, Plaintiff will be unable to show that Defendants have or are violating his constitutional rights.

II.

PLAINTIFF DOES NOT DEMONSTRATE AN ESSENTIAL ELEMENT OF STANDING

As a preliminary matter to all actions brought in federal court, a Plaintiff must demonstrate that he has standing. The "doctrine of standing" is a constitutional principle that prevents courts of law from undertaking tasks assigned to political branches. *Lewis v. Casey*, 518 U.S. 343, 349 (4th Cir. 1999). This doctrine is jurisdictional, and not subject to waiver. (*Id. at* fn. 1.) *See also United States v. Hays*, 515 U.S. 737, 742 (1995).

Lewis clarifies the standing requirements for a constitutional challenge by reminding the Court that "the Constitution requires a plaintiff to demonstrate actual injury in order to have a federal court adjudicate a claim and allows no exception prison-conditions cases." *Lewis*, 518 U.S. at 349-352. The Court explained that the requirement that an

inmate show "actual injury" derives from the constitutional principle of standing. *Lewis*, 518 U.S. at 349. If a claimant does not have standing, he is barred from bringing suit and the federal court is without jurisdiction to hear the claim. *See Allen v. Wright*, 468 U.S. 737, 750-52 (1984). "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. at p. 349. Further holding that, "it is not the role of courts, but that of political branches, to shape institutions of government in such fashion as to comply with the laws and the constitution." (Id.); *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997) (standing requires a legally and judicially cognizable injury).

Therefore, because a Plaintiff bears the burden of supporting each element of standing "in the same as any other matter on which the plaintiff bears the burden of proof . . ." (*Lewis v. Casey*, 518 U.S. at 358), the issue of actual injury to the Plaintiff must be resolved.

In this case, Plaintiff does not demonstrate how he has or will be harmed by any actions of the Defendants. Plaintiff does not indicate that, because of his race, he has received any lesser or greater privileges or benefits than any other inmate.[3] Plaintiff admits he receives the minimal necessities

3. When questioned at his deposition, Plaintiff departed dramatically from the complaint and stated that he considers it a "privilege" to be able to house with an inmate of his own race. (Pl's Depo., page 48:1-25). When pressed with questions from by his own attorney, Plaintiff clarified that he believes privileges are a "bad thing." (Pl's. Depo, at page 58.) He goes on to clarify when

(Cont'd)

guaranteed to prisoners under the Eighth Amendment. (Undisp. Fact # 32.) Plaintiff admits he never made a request to cell with an inmate of another race and therefore a request was never denied. (See Undisp. Facts #'s 33 and 34.) Plaintiff does not demonstrate "actual injury." Without this actual injury, the Plaintiff has no Article III standing under *Lewis*. For these reasons, the Complaint should be dismissed.

III.

PLAINTIFF HAS FAILED TO DEMONSTRATE A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS BY DEFENDANTS GOMEZ AND ROWLAND

Plaintiff contends that the former directors of the California Department of Corrections, Defendants Gomez and Rowland, violated his Eighth Amendment Rights. (4th Am. Compl., First Claim for Relief.)

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Under the Eighth Amendment, prison officials have a duty to "provide humane conditions of confinement . . . , [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures

(Cont'd)

questioned about his understanding of privileges, that he thinks they are both "good" and "bad." (Pl's. Depo, page 59: 1-28) A possible explanation for this is that Plaintiff's classification score shows him to have a lower than average I.Q. (See Exh. 3.)

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to guarantee the safety of the inmates . . .'" *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

To constitute the "unnecessary and wanton infliction of pain" necessary for an Eighth Amendment violation in the prison context, the United States Supreme Court requires that both an objective and subjective component of the Eighth Amendment be satisfied. *Wilson v. Seiter*, 501 U.S. 294 (1991). First, the deprivation complained of must be sufficiently serious by objective standards. *Wilson* at 297. A deprivation is sufficiently serious if it denies "'the minimal civilized measure of life's necessities.'" *Wilson*, at 297 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Specifically, the core areas protected by the Eighth amendment are food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). The Constitution does not mandate comfortable prisons and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. *Rhodes v. Chapman*, 452 U.S. at 347-349. Here, Plaintiff admits he has received all of the minimal necessities. Plaintiff contends he receives meals (Plaintiff's Deposition, p. 31: 1:7 and 32: 6-7), medical and mental health care (Plaintiff's Depo., p. 32: 9-10 and 15-17), shelter (p. 33: 1-4), exercise, sanitation and showers (p. 33: 5-15). As to his individual housing situation, Plaintiff selected his cellmate and is housed with an inmate with whom he claims he is compatible. (Undisp. Fact # 11.) Without even reaching the subjective standard, Plaintiff's claims do not rise to a Eighth Amendment constitutional violation.

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In addition to this objective standard, courts have required a Plaintiff to establish that Defendants acted with "deliberate indifference" to Plaintiff's needs. *Anderson v. County of Kern*, 45 F.3d 1310, 1313, amended by, 75 F.3d 448 (9th Cir.), cert. denied, 516 U.S. 916 (1995). In the Eighth Amendment context, the Supreme Court has interpreted this standard to require that an official subjectively "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Here, Plaintiff does not demonstrate that Defendants knew of and disregarded an excessive risk to his health and safety. In fact, Plaintiff never made his needs known to the Defendants.

Third, Plaintiff admits he had no personal involvement with the Defendants. (Undisp. Fact # 7.) To the extent Plaintiff is attempting to sue them in a supervisory capacity because of the conduct of unknown employee, he cannot. Supervisory personnel are not liable under 42 U.S.C. § 1983 for the actions of their subordinates under a theory of respondeat superior and, therefore, when a named Defendant holds a supervisorial position, the causal link between them and the claimed constitutional violation must be specifically alleged. *See, Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1978); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978). The Civil Rights Act does not establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-1438 (9th Cir. 1993). The Civil Rights Act provides relief only against those who, through their personal involvement as evidenced by affirmative acts, participation in another's affirmative acts, or failure to perform legally required duties, cause the deprivation of the plaintiff's

constitutionally protected rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *see also Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979).

Finally, a Plaintiff seeking relief in a federal action must allege the suffering of an injury in fact. *Sierra Club v. Morton* 405 U.S. 727, 739-740 (1972). As has been stated by the Seventh Circuit Court of Appeals:

> A section 1983 action is a tort damage action even though the duty the defendant is alleged to have breached is created by the constitution or Federal law. [cite] The elements of a cause of action under section 1983 are (1) a constitutionally recognized duty on the part of the state to conform to a certain standard of conduct for the protection of others against an unreasonable risk of harm; (2) a failure to conform to that standard; (3) a causal connection between the state's failure and the plaintiff's injury; and (4) actual injury.

Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Plaintiff has not demonstrated, nor can he prove, an injury and for these reasons, summary judgment should be granted in favor of Defendants and against Plaintiff as to Plaintiff's claims of violation of his Eighth Amendment Rights.

IV.

PLAINTIFF HAS NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAW

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction, the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Clause "does not take from the States all power of classification," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10, (1992). *See also City* of *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

To succeed on an Equal Protection claim, a Plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. *Personnel Administrator of Massachuesetts v. Feeny*, 442 U.S. 256, 279 (1979). It implies that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing adverse effects on an identifiable group. *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982). Once this showing is made, the Court proceeds to determine whether

the disparity in treatment can be justified under the requisite level of scrutiny. *See e.g.*, *City of Cleburne*, 473 U.S. at 439-40.

In this case, Plaintiff does not demonstrate that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group. While Plaintiff doesn't agree with all of the housing practices within the CDC, Plaintiff does not demonstrate that they are for the purpose of singling out a particular group for disparate treatment. Moreover, under the evidence in this case, there is no indication that the housing practices of the CDC are not applied across the board as to all inmates and there is no indication that Plaintiff is alleging this to be the case. Because of this, the Court need not even reach the second prong of the Equal Protection test, that is: whether or not the policy or practice at issues violates a constitutional right.

It has long been recognized that, within the prison environment, there are special considerations--those dictated by the needs and problems inherent in a penitentiary. *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) ("[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."); *see also Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons; save for the necessities of prison security and discipline." (internal quotation marks omitted)); *see also In re Long Term*, 174

F.3d 468 (1996) ("[e]ven assuming that analogous action outside the prison context would violate the Constitution, 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *quoting Turner v. Safley*, 482 U.S. 78, 89 (1987)).

In 1987, the Supreme Court decided *Turner* and set forth a new standard to evaluate all constitutional claims brought by inmates. Because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *Turner*, 482 U.S. at 84 (internal quotation marks omitted), the Supreme Court has held a "prison regulation [that] impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests" and not an exaggerated response to a particular concern, *id.* at 89. This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny.

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters

> of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.

Turner v. Safley at 89 (internal quotation marks omitted).

In determining whether a prison policy is constitutional, the Court considers four factors: (1) whether there is a valid, rational connection between the policy and the penological interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Turner*, 482 U.S. at 89-90.

In this case, the only issue that could apply is whether the CDC's practice of initially housing male inmates who require double-celling with an inmate of their own ethnic race is reasonably related to legitimate concerns for institutional security and the safety of persons. Defendants maintain that under the four *Turner* factors there is a reasonable relationship and that therefore Plaintiff's Constitutional rights are not implicated. *See Turner*, 482 U.S. at 89-90.

(1) Whether there is a valid, rational connection between the policy and the penological interest.

The initial period in a prison is a critical time for prison officials and inmates alike. Upon an inmate's arrival to a reception center, the CDC has only limited information about the inmate. (See Exh. 4, ¶ 5.) There needs to be a classification summary prepared so that security needs can be established. Disabilities, enemies and gang affiliation and numerous factors are examined. (See Exh. 4, ¶ 5-7.) Before these are known, there could be great risks to inmates if they were, for example, to be celled with a member of a rival gang. This classification period typically takes sixty days. (Exh. 4, ¶ 12.) After that, inmates are moved into more permanent housing and can utilize the period of time to find a compatible cellmate.

The Supreme Court recognizes, "prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal and often violent conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). The Supreme Court has held that safety is a legitimate penological interest. *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800 (1974)). In the instant case, in the judgment of prison officials, they do not have adequate information about the inmate until he is classified. To ensure that they are not placing rival gang members together, there is a rational connection between not housing inmates of potential gangs rivals, together with maintaining the safety of the institution. Therefore, Defendants are acting in a reasonable manner.

(2) Whether an alternative means of exercising the right remains open to prison inmates.

Once through the initial entry and classification periods, inmates may find a compatible cellmate and cell together. As stated by Associate Warden Schulteis,

> After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race. (Exh. 4, ¶ 14.)

As another alternative, if an inmate has a lower level of classification score, he can be housed in a dormitory. Inmates of all races are housed together in the dormitories. (Exh. 5, ¶ 8.)

(3) The impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources.

Housing inmates without regard to classification concerns that have been expressed would seriously threaten the safety and security of prisons. As stated by Mr. Cambra,

> If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC

prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (Exh. 4, ¶ 13.)

Therefore, I feel it would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface

inside of the individual cells. I cannot recommend this compromise of safety. (*Id.*, ¶ 14.)

If it is reasonable that there is an increased likelihood of disorder, then the adverse impact is substantial. Accommodating the right poses a threat to the safety of corrections staff and other inmates. Without doubt, inmates should not be encouraged to engage in activities that harm other inmates or staff.

(4) The absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests.

Plaintiff has not demonstrated an alternative which will meet the legitimate penological goal of protecting the safety of California prisons, and no easy alternative exists. The most obvious alternative is not to place inmates into double cells. The costs of this approach, however, seems far from de minimis. To the extent that Plaintiff may claim that prison officials should more carefully supervise each individual cell to prevent violence from occurring, this is also impractical and unreasonable given staffing requirements and resources within California's prison system. To the extent that Plaintiff may contend that all classification could be completed in one day, this is also unreasonable, as Mr. Cambra has indicated the process typically takes 60 days.

Therefore, a consideration of the four factors leads only to the conclusion that the policy and practices at question are constitutional prison policies serving a legitimate and neutral objective of prison security, since initially housing

inmates requiring two-man cells with inmates of the same race is deemed by prison officials to be important to maintaining safety and security during this initial period of time of entry into a prison.

The Supreme Court and this Court have stated that prison administrators should receive wide-ranging deference in the adoption and execution of policies and practices that are needed to preserve the internal order and discipline of institutional security. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Turner v. Safley*, 482 U.S. 78; *Thornburgh v. Abbott*, 490 U.S. at 401 (1989), deferring to the prison officials' judgment that the accommodation of inmates' requests for publications deemed to be inappropriate by prison officials, jeopardized institutional safety, order, and discipline. *Thornburgh*, 490 U.S. at 404); *Dennis v. Thurman*, 959 F.Supp. 1253 (1997).

The generality of *Turner's* reasonableness test, and common sense as well, suggest that the flexibility open to the prison officials must be observed in institutions for the care and custody of those who have already transgressed society's norms. Because gang violence and racial rioting disrupt the safety, security, order, and discipline in prisons, the approach of celling inmates initially with inmates of their own race upon arrival and then, once in a housing facility, encouraging inmates to find a cellmate with whom they are compatible is necessary to protect the inmates and prison staff. Moreover, under the *Turner* analysis, the question for the Court is not whether this does approach does in fact advance the government interest, but whether the Defendants might reasonably have thought that it would.

Plaintiff has failed to state a constitutional claim against Defendants and for these reasons, the district court properly granted summary judgment in favor of Defendants and against Plaintiff.

IV.

THERE IS NO EVIDENCE OF A CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff alleges that Defendants conspired against him. 42 U.S.C. § 1985 prohibits individuals fro.:: entering into a conspiracy to deprive an individual of his civil rights. Under the clauses of section 1985, an allegation of racial or class-based animus is an essential element of the claim. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). To establish such animus, a plaintiff must show an "invidiously discriminatory motivation . . . behind the conspirators' action." (*Id.* at 561)

Further, a conspiracy allegation does not give rise to section 1983 liability unless there is an actual deprivation of civil rights. *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir.1989); *Escamilla v. City of Santa Ana*, 606 F. Supp. 928, 934, *aff'd*, 796 F.2d 266 (1985).

In this case, Plaintiff has not produced evidence of class-based animus. There has been no violation of a constitutional right and no conduct by Defendants in furtherance of a conspiracy to violate Plaintiff's constitutional rights. Summary judgment should be granted in favor of Defendants on Plaintiff's claim of conspiracy.

V.

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

It is well established that in order to justify a grant of permanent injunction, the movant has the burden of establishing: (1) that the court's exercise of equity jurisdiction is proper, *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); (2) that the movant has succeeded in proving the merits of its case, *Cib-Geigy Corp. v. Bolar Pharmaceutical Co.*, 747 F.2d 844, 850 (3rd Cir. 1984); and (3) that the balance of equities tips in favor of injunctive relief. *Id.* When a prisoner requests injunctive relief, said request "must always be viewed with great caution because 'judicial restraint is especially called for in dealing with complex and intractable problems of prison administration.'" *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir.1995) (citations omitted). Where a prisoner requests an injunction that would require the Court to intervene with the management of a state prison, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *see Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.").

In this case, the balance of the equities does not justify injunctive relief. Defendants, in their experience, know that there will be the risk of violence if the requested relief was granted. Defendants are not adequately equipped to handle the additional violence, and the prison facilities are not

designed to handle additional violence. Moreover, the risk of injury to inmates to staff is known and is too great to be ignored.

VI.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Prison officials, performing discretionary functions within the limits of their duties, receive a qualified immunity from damages in Civil Rights actions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette*, 434 U.S. 555, 561-562, 98 S. Ct. 855 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819, 102 S. Ct. 2727 (1982). The purpose of this rule is to permit such officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Id.* at 819; *Kraus v. County of Pierce*, 793 F.2d 1105, 1108 (9th Cir. 1986). "As the qualified immunity defense has evolved, it provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). An official is denied qualified immunity only if the law was clearly established and a reasonable official could not have believed that his conduct was lawful. *Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir. 1997).

Thus, in deciding whether an official is entitled to qualified immunity, the court must inquire: (1) whether the

law governing the official's conduct was clearly established at the time of the alleged violation; and (2) under the law, whether a reasonable official could have believed the conduct did not violate an identifiable right. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir.1993). The inquiry focuses on whether a reasonable official in the position of any of the defendants could have believed that his conduct in question was lawful. *See id.* at 872. Additionally, the Ninth Circuit has stated that,

> The question of whether a reasonable [official] could have believed [that his conduct was lawful] is 'an essentially legal question' . . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.

See id., at 873 (citation omitted).

In this case, there was no violation of a clearly established law. Moreover, Defendants could have reasonably believed that their conduct was lawful under the established legal principles. First, under *Lee v. Washington*, 390 U.S. 333, 334 (1968), prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. Second, Defendants could have reasonably believed that placing Plaintiff into a cell with a person of his own race for a short duration until they are able to classify them and ensure there are no rival gang issues

Appendix I

at stake is lawful under the established law. Thus, both defendants are entitled to qualified immunity. *See Act Up!/ Portland*, 988 F.2d at 871-72.

CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Defendants Rowland, Gomez and Cambra and against Plaintiff.

DATED: April 6, 2001

BILL LOCKYER
Attorney General

DAVID P. DRULINER
Chief Assistant Attorney General

PAUL D. GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Sara E. Turner
SARA E. TURNER
Deputy Attorney General

Attorneys for Defendants

APPENDIX J — DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

TO: PLAINTIFF GARRISON S. JOHNSON AND TO HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on May 7, 2001, at 10:00 a.m. or as soon thereafter as the matter may be heard in

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Courtroom Two of the above-referenced court located at 312 N. Spring Street, Los Angeles, California, Defendants J. Gomez, J. Rowland and S. Cambra will move this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is made on the grounds that the allegations of the Complaint fail to state a claim for relief under 42 U.S.C. § 1983, that Plaintiff lacks standing, that there are no genuine issues of material fact in dispute, that Defendants are entitled to the defense of qualified immunity and that Defendants are entitled to judgment as a matter of law.

This motion is based upon this notice of motion and motion, the memorandum of points and authorities filed in support, the Court's file in this action, and the proposed order, a copy of which is submitted herewith.

DATED: April 6, 2001

Appendix J

BILL LOCKYER
Attorney General

DAVID DRULINER
Chief Assistant Attorney General

PAUL GIFFORD,
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Sara Turner
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

Appendix J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF S. CAMBRA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Steven Cambra, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 30 years. Presently, I am the acting Director of Corrections.

2. In addition to serving as the Director of the Department of Corrections, I have served as a Regional Administrator for the CDC. In addition to these capacities, I have served as a Warden, an Associate Warden, a Captain, Lieutenant, Sergeant and Correctional Officer.

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3. I have worked with inmates in all housing security levels. As the Regional Administrator, I oversaw the prison institutions within my Region. As the Acting Director, I oversee all of the prisons.

4. I am familiar with the CDC's policies and practices with respect to housing decisions. Inmates are housed double-celled (two inmates per cell) or in dormitories. With respect to double-celling, a critical goal on the part of prison officials is that this be done in a manner to maintain the inmates' individual safety as well as the safety of the staff and the institution as a whole.

5. An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to his physical, mental and emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests.

6. The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC

evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates who he may have had disputes with during previous prison placements.

7. With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation.

8. In addition to the factors identified in paragraph 7, above, race is considered during the initial double-cell housing classification decision.

9. The reason race is a consideration in an initial housing decision is, based on CDC's experience, that CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior.

10. Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially; housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else.

11. If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused.

12. After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as a his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement.

13. Despite Plaintiff s belief, at no institution is "race" the "sole factor" in a housing decision. If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate

onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell.

14. Therefore, I feel that not considering race in an initial housing decision would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety.

15. In my experience with the CDC, I have found that the ideal situation for a two-person cell is that an inmate finds another inmate with whom he or she

is compatible and both inmates indicate to their prison housing staff of their request to be housed together. In light of this goal, I would not recommend that race not be considered in the initial housing decision.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of April, 2001, at Sacramento, California.

s/ Steven Cambra
STEVEN CAMBRA, DIRECTOR (A)
CALIFORNIA DEPARTMENT
OF CORRECTIONS

Appendix J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF L. SCHULTEIS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Linda Schulteis, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for twenty-four years. Presently, I am an Associate Warden at the California State Prison for Los Angeles County located in Lancaster ("CSP-Lancaster").

2. In addition to serving as an Associate Warden, I have served as a Captain Lieutenant, Sergeant and Correctional Officer.

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3. In my present capacity as an Associate Warden, among my duties, I oversee the Receiving and Release ("R & R") section of CSP-Lancaster and am responsible for the aspect of the prison which assigns inmates to cells upon initial arrival at this institution.

4. CSP-Lancaster is a high, security, Level III and IV prison. When inmates are received into the prison, it is essential that they are promptly assigned a bed. A report generated by the Control Sergeants indicates which beds are currently empty.

5. If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of his same ethnic race. In addition, we also look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group.

6. We also try to house an inmate with an inmate close to his own age. Also, for example, we attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. We also consider other factors such as, but not limited to, enemy concerns, custody level and classification.

7. We make housing decisions in the manner described above because we have found that it will be the least likely to lead to conflict among the

prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard.

8. With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. We attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past

9. As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together.

10. However, as to the initial housing assignment if we were not to consider race and gang affiliation in the initial double-cell housing decision, I am certain that there will be conflicts both in the cells and the conflict will flow onto the yards. Although we would rather the inmate population not focus on these areas in a manner leading to conflict, we find that the inmates do place a weight on the issue. I believe this focus is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells.

11. At CSP-Lancaster, if we were to disregard the initial housing placement being done in the manner set

forth in paragraph five, then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them.

12. I am therefore not willing to knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate or group of inmates safety by taking steps that I know would result in violence and conflict. My responsibility is to preserve the safety and security of the institution, inmates and staff and given that responsibility, I would therefore not ignore a known issue impacting safety.

13. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race.

14. This is a policy designed around inmates finding a compatible cellmate. We get hundreds of these requests and almost all are granted This policy has compatibility as the goal, and it operates effectively, is encouraged and results in the lowest potential for conflict or violence among the inmates which is the desired goal of prison administrators.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April, 2001, at Sacramento, California.

s/ L. Schulteis AW
L. SCHULTEIS, ASSOCIATE WARDEN
CSP-LANCASTER

Appendix J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF S. TURNER

I, Sara Turner, declare and state:

1. I am employed by the California Attorney General's Office as a Deputy Attorney General in the Correctional Law Section. I am admitted to practice before this Court and courts of the State of California. I have been assigned to represent the Defendants in the above-entitled action.

2. In the course of preparing to file a motion for summary judgment pursuant to the order of the Court, this office requested copies of various documents from Plaintiff Garrison Johnson's correctional file.

3. Attached hereto is a true and correct copy of the following documents which were submitted to this office in response to that request.

These document are submitted in support of Defendants' motion for summary judgment.

Exhibit 1: Abstract of Judgment for Garrison Johnson.

Exhibit 2: CDC-112, Chronological History for Garrison Johnson.

Exhibit 3: Institutional Staff Recommendation Summary for Garrison Johnson, D-59672.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of April, 2001, at San Francisco, California.

s/ Sara Turner
SARA TURNER

P.C.

R S Davis

DEPT. 115

6/22/87

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: June 17, 1987

HONORABLE: MICHAEL L BURKE JUDGE, D BINGHAM Deputy Sheriff, J M PULIDO Deputy C., P LA POINTE Reporter

(Parties and counsel checked if pres

A778000

PEOPLE OF THE STATE OF CALIFORNIA

VS

X JOHNSON, GARY X046698 8417099

Counsel for Plaintiff: X IRA A REINER, DISTRICT ATTY. BY R SCHWARTZ DEPUTY

Counsel for Defendant: X S WEISS PVT.

(Boxes checked if order applicab

NATURE OF PROCEEDINGS PROBATION AND SENTENCE

Court advises defendant of his appeal/parole rights.
Notice of Appeal recieved this date.
Pay restitution fine of $100.00.

PROBATION DENIED. SENTENCE AS INDICATED BELOW.

Whereas the said defendant having been duly found guilty in this court of the crime of MURDER (187 PC), as charged in count 12 of the information; which the Jury found to be murder in the first degree

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison. for the term of 25 years to LIFE.

☐ Defendant is given credit for.....days in custody (includes_____days good time/work time).

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles and delivered by him into the custody of the Director of Corrections at the California State Institution

☒ for Men at Chino, California
☐ for Women at Frontera, California
☐ .....

☐ Remaining count(s) dismissed in interests of justice.
☐ Bail exonerated.

ENTERED
06-17-87
FRANK S ZOL
COUNTY CLERK
AND CLERK OF THE
SUPERIOR COURT

NJ

2 TRIPLICATE (REV. 7-65) 7-65 C-139

JUDGMENT

PINK ORIGINAL TO FILE
WHITE COPY TO MICROFILM
YELLOW COPY TO STATEWIDE DISTRIBUTI
GREEN COPY TO PROBATION EXPEDITER

256a

Appendix J

ABSTRACT OF JUDGMENT – COMMITMENT

FORM DSL 29

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
BRANCH CENTRAL CRIMINAL

COURT I.D. 1 9 0 0 0 1

CASE NUMBER(S): A778000 -A; -B; -C; -D; -E

PEOPLE OF THE STATE OF CALIFORNIA
DEFENDANT: JOHNSON, GARY
AKA:

VERSUS [X] PRESENT [ ] NOT PRESENT

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT [X] AMENDED ABSTRACT

DATE OF HEARING (MO) (DAY) (YR)	DEPT. NO.	JUDGE	CLERK
06 17 87	115	MICHAEL L BURKE	J M PULIDO

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR PROBATION OFFICER
P LA POINTE	R SCHWARTZ	S WEISS PVT	X046698

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES:

A. [X] ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT 1A

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTION BY JURY TRIAL	COURT TRIAL	PLEA	FELONY (F) OR (M)	SENTENCE RELATION CONCURRENT	CONSECUTIVE (C) VIOLENT	CONSECUTIVE (C) NONVIOLENT	CONSECUTIVE (C) FULL TERMS	CONSECUTIVE (C) SUBSTANTIAL SENTENCE ENHANCEMENTS	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YEARS	MONTHS
1	PC	213.5	RES ROBBERY	85	02	24	87	X			F							6	
4	PC	213.5	RES ROBBERY	85	02	24	87	X			M		X					1	4
7	PC	245(a)(1)	ASLT W/DLY WPN	86	02	24	87	X			M		X					1	

2. ENHANCEMENTS (CHARGED AND FOUND, STRICKEN, TIME IMPOSED):

COUNT	12022(a) C/P	S	I	12022(b) C/P	S	I	12022.5(a) C/P	S	I	12022.5(b) C/P	S	I	12022.5 C/P	S	I	12022.6(a) C/P	S	I	12022.6(b) C/P	S	I	12022.7 C/P	S	I	12022.8 C/P	S	I	C/P	S	I

3. INCOMPLETED SENTENCE(S) CONSECUTIVE:

COUNTY	CASE NUMBER	CREDIT FOR TIME SERVED

4. OTHER ORDERS:

COUNTS 1,4,7,16 AND 18 TO RUN CONSECUTIVE WITH COUNT 12.

5. A. NUMBER OF PRIOR PRISON TERMS:

§	C/P	S	I
667.5(a)	0	0	0
667.5(b)	0	0	0
667.5(b)	0	0	0

B. NUMBER OF PRIOR FELONY CONVICTIONS:

§	C/P	S	I
667.5(a)	0	0	0

6. TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DSL 290-A): 2 8

7. TIME STAYED § 1170.1(a) [5-YEAR LIMIT] AND/OR § 1170.1(f) [DOUBLE BASE LIMIT]:

8. TOTAL TERM IMPOSED: 11

9. EXECUTION OF SENTENCE IMPOSED:

A. [X] AT INITIAL SENTENCING HEARING
B. [ ] AT RESENTENCING PURSUANT TO DECISION ON APPEAL
C. [ ] AFTER REVOCATION OF PROBATION
D. [ ] AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT [PC1170(d)]

10. DATE SENTENCE PRONOUNCED: MO 06 DAY 17 YEAR 87

CREDIT FOR TIME SPENT IN CUSTODY: TOTAL DAYS 606 INCLUDING: ACTUAL LOCAL 404 LOCAL CONDUCT CREDIT 202 STATE INSTITUTIONS [ ] CMH [ ] CDC

11. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

[X] FORTHWITH
[ ] AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:
[ ] CALIF. INSTITUTION FOR WOMEN — FRONTERA
[ ] CALIF. [illegible] FACILITY — [illegible]
[X] CALIF. INSTITUTION FOR MEN — CHINO
[ ] OTHER (specify):

CLERK OF SUPERIOR COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE: [signature]

DATE: DEC 10 1987

SUPERIOR COURT LOS ANGELES COUNTY

This form is prescribed pursuant to Penal Code §1213.5 to satisfy the requirements of Penal Code §1213 (Abstract of Judgment) and Penal Code §1213.5 (Commitment) for determinate sentences under Penal Code §1170. A copy of probation report shall accompany the Department of Corrections' copy of this form pursuant to Penal Code §1203. A copy of the sentencing proceedings and any supplementary probation report shall be transmitted to the Department pursuant to Penal Code §1203.01. Attachments may be used but must be incorporated by reference.

Form Adopted by the Judicial Council of California
Effective July 1, 1981

ABSTRACT OF JUDGMENT – COMMITMENT
FORM DSL 290

Pen.C. 1213.5

Appendix J

STATE OF CALIFORNIA

CHRONOLOGICAL HISTORY

DEPARTMENT OF CORRECTIONS

CDC 112 (9-83)

Date	Chronological Listings	Initials	Dead Time	Release Date
JUN 22 1987	REC-CIM			
7-3-87	Intake Audit	L		
7-6-87	Add'l Commit rec'd by mail.			
	LA Co A778000 TT: 36 to life			
	cc w/PT. Term Sheet 6-22-87	(W)		
7-14-87	Audited			
	RECD FOLSOM STATE PRISON			
JUL 31 1987				
11-20-87	Intake Audit (A2)	LH		
12-10-87	Amended Abstract rec'd on case #A778000			
	No change in term.	LH		
7-24-89	Credit loss for 30 days CDC 115 of 6-2089	LH	MEPD	10-9-2010
7-24-89	Notice required per 3058.6 PC	LH		
11-18-89	MEPD reviewed per In re Monigold.		MEPD	7-22-2010
	Pl. on 11/96 Doc #1. (A2)			
1-30-91	work group change for DSL portion of term, A1 eff		DOC #1	10/96
	12-6-90 (A1)		MEPD	10-19-2009
7-30-91	RECEIVED CSP FOLSOM NEW FACILITY			
8-21-91	Rec'd O/C Folsom	cwb		
9-5-91	Intake Audit - BCL, CDC-115 of 7-30-91, log			
	I910754, 60 days; work group change for DSL		DOC #1	10/96
	portion of term, A2 eff 8-20-91 (A2)		MEPD	8-19-2010
10-22-91	work group change for DSL portion of term, A1 eff 9-8-91 (A1)		MEPD	12-5-2009
			DOC #1	4/96
12-24-91	RECEIVED CSP FOLSOM NEW FACILITY			
12-31-91	Rec'd O/C Folsom			
1-10-92	Intake - Facility Doc #1 9-92	Bee	MEPD	5-10-2010
2-7-92	WCL Log 1911254 dated 12-24-91,			
	30 days	Bee	MEPD	6-10-2010
3-12-92	Transfer audit	Bee		

Page 1

Number D-59672 Name JOHNSON, GARRISON

Appendix J

STATE OF CALIFORNIA

CHRONOLOGICAL HISTORY

DEPARTMENT OF CORRECTIONS

CDC 112 (9-83)

Date	Chronological Listings	Initials	Dead Time	Release Date
3-12-92	REC'D CALIPATRIA STATE PRISON	Efre		
12-3-93	Arcvd. CMC East	dwr		
1-8-93	OTC Fol. Plaint Case# CIV S-91-1351 EJW AMP	DD		
2-2-94	RTN OTC Fol. Plaint Case# CIV S-91-1351 EJW AMP	DD		
2-24-94	Intake Audit. 30 day BCL. CDC 115 of 10-12-93, Log# 1093B33. Restitution ordered per SB County Cases: #A778000 for $100.00; #A751285 for $100.00 & # A775207 for $100.00. Doc#1=10-96 INIT=6-2009.	DD	PAROLED	7-1-2010
15 MAR 1994	REC'D CSP-LAC	BB		
11-17-94	On Take Audit BCL 30 day A94080436 8-10-94, BCL 90 day Fd94080080 9-29-94 Doc#1 9/96 in.	DD	Paroled	2-12-2011
12/7/94	XFER TO RJD FOR OTC WITNESS: CASE#931785J	BB		
4-5-95	REC'd from OTC/RJD CSP-LAC	DD		

Number D59672 Name Johnson, Harrison Page 2

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INSTITUTIONAL STAFF RECOMMENDATION SUMMARY

SOURCES OF REPORT: Probation officer's reports dated 3/24/87, 6/9/86 and 2/21/86, Abstracts of Judgment in cases A778000, A775207 and A751285, CLETS printout of 6/25/87 and personal interview on 7/17/87.

CONFIDENTIAL INFORMATION: None as of dictation.

HOLDS/DETAINERS: None as of dictation.

MEDICAL/DENTAL: Full duty no camp due to history of gunshot wound to head and left eye blindness. Dental class N/A.

PSYCHIATRIC/PSYCHOLOGICAL: No referral indicated.

7/20/87 Leisla M. Howell, Senior Psychologist

WORK SKILLS: Johnson's only prior work experience was employment in a car wash.

NARCOTICS/DRUGS/ALCOHOL: Johnson admits to occasional use of alcohol and since the age of fifteen, he has been using marijuana, PCP and cocaine. He admits to experimentation of "acid" and methamphetamines.

ESCAPE HISTORY: None as of dictation.

ARSON HISTORY: None as of dictation.

SEX RELATED OFFENSES: None as of dictation.

ACADEMIC/VOCATIONAL: Johnson has a Revised Beta IQ of 44 with a grade point level of 4.3. He claims he attended school until the eleventh grade.

CASEWORK FOLLOW-UP: Current CII, FBI and any law enforcement agency information.

EVALUATION: Johnson is a twenty-two year old first termer committed to CDC on 6/22/87 from Los Angeles County with one count of Murder First, three counts of Residential Robbery and one count of Assault With a Deadly Weapon with a total term of thirty-six years to life. The essence of the offense is that during the months of December, 1985 and January, 1986, Johnson and his codefendant were involved in four residential robberies wherein they assaulted the victim with deadly weapons and firearms and pistol whipped one victim to death.

Johnson's prior criminal history began as a juvenile at the age of thirteen consisting of property and assault offenses. He has been placed in juvenile camp, placed on probation and served county jail sentences.

Appendix J

SOCIAL FACTORS

PARENTS	NAME	DOB/AGE	OCCUPATION	ADDRESS
MOTHER:	Helen Johnson	47	Nurse	Los Angeles,CA.
FATHER:	Garrison Johnson	?	Mechanic	Philadelphia, Pa.

SIBLINGS	DOB/AGE	SIBLINGS	DOB/AGE
Steven Johnson	20		
Dave Johnson	18		
Sandy Johnson	24		
Brenthe Johnson	26		
Eunice Johnson	16		

MARRIAGES	LOCATION	DATE	CURRENT ADDRESS	OUTCOME
None				

NOT LEGALIZED
None

CHILDREN	DOB/AGE	SUPPORTED BY	LIVING WITH
Bo Garrison Johnson	14 mos.	AFDC	Mother-Jamea Harding Living with maternal aunt.

FAMILY ARREST HISTORY
Brother Steven Johnson - CYA - robbery.

SOCIAL SECURITY NUMBER: Unknown
DRIVER'S LICENSE: None
RELIGION: Baptist

NAME JOHNSON NUMBER D-59672 DATE 7/20/87

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INITIAL PSYCHOLOGICAL SCREENING

TESTS ADMINISTERED: California Achievement Test, Revised Beta, Draw-A-Person, Who-Are-You, Sentence Completion, Personal Information.

INTELLECTUAL CLASSIFICATION: Moderate Mental Retardation.

Leisla M. Howell, Senior Psychologist
Licensed Psychologist No.: PA 000183

B Battery

Appendix J

During the personal interview, Johnson was polite and cooperative. He was very candid concerning his extensive drug usage. He denied current gang involvement but claimed during his early teens, he "gang banged" as a CRIP. He adamantly denied guilt in the committing offense or any of the charges he had been arrested for. In fact he tried to deny his entire arrest record; he even denied that any of his codefendants were guilty in any of the cases. It appears Johnson has difficulty in accepting his behavior and is attempting to convince everyone, even himself of his criminal history.

While processing through RCC/CIM, Johnson has remained disciplinary free but considering his age and immaturity, possible management problems can be anticipated. He should be able to function in a mainline setting consistent with his classification score.

RE-ENTRY PLANS: Not applicable.

TRANSFER

CLASSIFICATION SCORE: 115 **CUSTODY LEVEL:** IV

INSTITUTION RECOMMENDATION: Folsom/CCI-IV.

REASON FOR OUT OF CLASS RECOMMENDATION:

CORRECTIONAL COUNSELOR: M. James, CC I, 7/17/87

SUPERVISOR'S RECOMMENDATION: Folsom. Gamg oriented. Youthful offender. Management concerns anticipated. Violent offenses.

7-21-87 L. Myers, CCII(A) aam 7-23-87

6/5/97
LA County
Last County
of residence
B. Jackson CI

APPENDIX K — STATEMENT OF UNCONTROVERTED FACT AND CONCLUSIONS OF LAW [U.S. DISTRICT COURT CENTRAL DISTRICT RULE 7.14] DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

STATEMENT OF UNCONTROVERTED FACT AND CONCLUSIONS OF LAW [U.S. DISTRICT COURT CENTRAL DISTRICT RULE 7.14]

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

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The above entitled case came on regularly for hearing on motion for summary judgment, and the court, having duly considered the complaint, the moving papers, the exhibits and other papers on file in this action, now finds the following:

FINDINGS OF FACT

I.

Plaintiff is a prisoner in the custody of the California Department of Corrections (the "CDC"). (4th Am. Compl., ¶ 2.)

II.

Plaintiff was sentenced to state prison on June 17, 1987, by the Superior Court of the California, County of Los Angeles, for twenty-five years to life in state prison for one count of violation of Penal Code § 187 (murder). Plaintiff also received an additional eleven year consecutive term for four counts of violation of Pen. Code § 213.5 (residential robbery) and one count of violation of Pen. Code § 245(a)(1) (assault with a deadly weapon). (Exh. 1, Judgment..)

III.

Plaintiff was received at the California Institution for Men on June 22. 1997. (Exh. 2, CDC- 112.)

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IV.

Plaintiff's classification summary was prepared on July 20, 1987. (Exh. 3, Institutional Classification Summary.) The document makes no reference to Plaintiff's race. (*Id.*)

V.

Defendants Rowland and Gomez are former Directors of the CDC. (Answer, ¶ 4.)

VI.

Defendant Steven Cambra, sued in his official capacity, is the Acting Director of the CDC. (Declaration of Steven Cambra, hereinafter, Exh. 4, ¶ 1.)

VII.

Plaintiff never had any personal contact with Defendant, Mr. Rowland or Mr. Gomez (Plaintiff Garrison Johnson's Deposition, attached to Notice of Lodgement, filed and served herewith, page 20: 19-21:9).

VIII.

Inmates are housed double-celled (two inmates per cell) or in dormitories. (Exh. 4, ¶ 4.)

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IX.

Plaintiff's custody level does not qualify him for dormitory housing. (Pl's Dep., page 44: 20-45: 6.)

X.

Plaintiff is housed in a two-man cell at CSP-Lancaster. (Compl., ¶ 9.)

XI.

Plaintiff's cell-mate is Mr. Stubbs. (Pl's. Dep., p. 18:25-19:1.) Plaintiff cells with Mr. Stubbs because he finds they are compatible. (*Id.* at, pp. 19: 10-20: 6.)

XII.

If Plaintiff found he was compatible with someone of a different race and wanted to house with that person, he could. (Pl's Dep., p. 25: 11-18.)

XIII.

An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to his physical, mental and

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emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests. (Exh. 4, ¶ 5.)

XIV.

The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates who he may have had disputes with during previous prison placements. (Exh. 4, ¶ 6.)

XV.

With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation. (Exh. 4, ¶ 7.)

XVI.

In addition to the factors identified above, race is considered during the initial double-cell housing classification decision. (Exh. 4, ¶ 8.)

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XVII.

The reason race is a consideration in an initial housing decision is, based on CDC's experience, that CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior. (Exh. 4, ¶ 9.)

XVIII.

Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else. (Exh. 4, ¶ 10.)

IXX.

If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused. (Exh. 4, ¶ 11.)

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XX.

After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement. (Exh. 4, ¶ 12.)

XXI.

Plaintiff transferred to CSP-Lancaster on March 15, 1994. (Exh. 2.)

XXII.

At CSP-Lancaster, with respect to the initial housing, if the inmate will be housed in a double-cell, the initial housing is generally done by housing an inmate with another inmate of his same ethnic race. In addition, at CSP-Lancaster, administrators look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group. (Declaration of L. Schulteis, Associate Warden, CSP-Lancaster, hereinafter, Exh. 5, ¶ 5.)

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XXIII.

At CSP-Lancaster, prison officials also try to house an inmate with an inmate close to his own age. Also, for example, prison officials attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. Prison officials also consider other factors such as enemy concerns, custody level and classification. (Exh. 5, ¶ 6.)

XXIV.

At CSP-Lancaster, prison officials make housing decisions in the manner described above because they find that it will be the least likely to lead to conflict among the prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard. (Exh. 5, ¶ 7.)

XXV.

With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. Prison officials attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past. (Exh. 5, ¶ 8.)

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XXVI.

As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together. (Exh. 5, ¶ 9.)

XXVII.

As to the initial housing assignment, if prison officials at CSP-Lancaster were not to consider race and gang affiliation in the initial double-cell housing decision, there will be conflicts both in the cells and the conflict will flow onto the yards. Although prison officials would prefer the inmate population not focus on these areas in a manner leading to conflict, prison officials find that the inmates do place a weight on the issue. The reason is that is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells. (Exh. 5, ¶ 10.)

XXVIII.

At CSP-Lancaster, if prison officials we were to disregard the initial housing placement being done in the manner set forth above, then it is certain there would be serious violence among inmates. (Exh. 5, ¶ 11.)

XXIX.

Prison officials making initial housing decisions at CSP Lancaster are not willing to knowingly disregard the factors and place and inmate into jeopardy and would not

compromise an inmate or group of inmates safety by taking steps that they know would result in violence and conflict. As it is a duty of prison officials to preserve the safety and security of the institution, inmates and staff and given that responsibility, staff would therefore not ignore a known issue impacting safety. (See Exh. 5, ¶ 12.)

XXX.

After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race. (Exh. 5, ¶ 13.)

XXXI.

Plaintiff was formerly a member of the "Crip" gang. (Pl's Depo., p. 27: 16-24; see also Exh. 3.)

XXXII.

Plaintiff appropriately receives meals (Pl's Depo., p. 31: 1:7 and 32: 6-7), medical and mental health care (*Id.*, p. 32: 9-10 and 15-17), shelter (p. 33: 1-4), exercise, sanitation and showers (*Id.*, p. 33: 5-15).

XXXIII.

Plaintiff has never made a request to cell with a person of a different race. (*Id.*, p. 39: 2-5.)

XXXIV.

Prior to filing the lawsuit Plaintiff never mentioned to prisoner officials that he wanted to live with somebody of a different race. (*Id.*, p. 45: 9-14.) Plaintiff never filed an inmate appeal on the issues raised in his complaint. (*Id.*, p. 45: 17-18.)

XXXV.

Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. (Exh. 4, Cambra Decl., ¶ 13.) If race were to be disregarded entirely, however, there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. There will be fights in the cells and the problems will emanate onto the prison yards. Prison housing staff are not adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. Because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, there would be an additional risk to

prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (*Id.*)

XXXVI.

Plaintiff, as a prisoner, agrees there is racial tension in the prison. (Pl's. Depo., p. 35: 2-4.)

XXXVII.

Plaintiff contends he was transferred from a prison prior to a racial riot breaking out. Specifically, he states [referring to Calipatria State Prison]: "[i]f I would have stayed there, I would have been involved in that because you have in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based on your skin color. I'm Black, and if I was there I would been hurt." (*Id.*, p. 35: 15-23.)

XXXVIII.

Plaintiff says that racial riots occur at Lancaster. (*Id.*, p. 36: 14-19.)

CONCLUSIONS OF LAW

I

Plaintiff is not entitled to relief because he has failed to state a cause of action pursuant to Title 42, United States Code, section 1983.

II.

Plaintiff is not entitled to relief as Plaintiff has failed to demonstrate an essential element of standing.

III.

Plaintiff has failed to demonstrate a violation of his Eighth Amendment Rights by Defendants Gomez and Rowland.

IV.

Plaintiff has not been denied the Equal Protection of the law.

IV.

Plaintiff Fourteenth Amendment Constitutional rights have not been denied.

V.

Plaintiff has failed to demonstrate there was a conspiracy to violate his constitutional rights.

VI.

Plaintiff is not entitled to injunctive relief.

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VII.

Defendants housing practices with respect to initial housing into two-men cells are reasonably related to legitimate penological concerns.

VIII.

Defendants are entitled to the defense of qualified immunity.

IX.

Plaintiff is not entitled to relief because he failed to establish that a material issue of fact exists.

X.

Plaintiff has failed to state a claim for which relief may be granted against Defendant in an action brought under 42 U.S.C. section 1983, in that Plaintiff has not established that Defendant violated any of Plaintiff's federally protected constitutional rights.

XI.

Any conclusion of law deemed to be an uncontroverted fact is hereby incorporated into the findings of fact.

DATED: April 9, 2001

Appendix K

Presented By:
BILL LOCKYER
Attorney General

PAUL GIFFORD,
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Robert F. Helfand for
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

DATED:

HON. CONSUELO B. MARSHALL
United States District Court Judge

APPENDIX L — DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES DATED APRIL 23, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

[Tables of Contents and Authorities Intentionally Omitted]

Defendants Cambra, Gomez, and Rowland submit the following in opposition to Plaintiff's motion for summary adjudication of issues filed April 9, 2001. Defendants

respectfully request that when considering this opposition, the Court take notice and consider Defendants' motion for summary judgment as to all issues which is also set for hearing on May 7, 2001.

PRELIMINARY STATEMENT

This is an action brought pursuant to 42 U.S.C. § 1983. Plaintiff, Garrison S. Johnson, a Level-IV, state prisoner incarcerated at the California State Prison for Los Angeles County located in Lancaster, California ("CSP-Lancaster"), contends that there has been "invidious discrimination" by the State of California Department of Corrections, its former Directors, James H. Gomez and James Rowland," alleging they are liable for "formulating and implementing a policy and practice of housing inmates based solely on their race." (Fourth Amended Compl., ¶ 1.)

Plaintiff has filed a motion for summary adjudication of his second and third claims for relief contending that Defendants violated and conspired to violate his Fourteenth Amendment right of Equal Protection of the Law.

II.

PLAINTIFF HAS MADE NO SHOWING THAT HIS CONSTITUTIONAL RIGHTS WERE OR HAVE BEEN VIOLATED BY THE DEFENDANTS.

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall . . . deny to any person within its

jurisdiction, the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Clause "does not take from the States all power of classification," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn,* 505 U.S. 1, 10, (1992). *See also City of Cleburne v. Cleburne Living Ctr., Inc,* 473 U.S. 432, 440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

The United States Supreme Court has held that segregation of the races in prisons and jails violates the Equal Protection Clause of the Fourteenth Amendment. The Court recognized, however, "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee v. Washington,* 390 U.S. 333, 334 (1968); *see, also, Cruz v. Beto,* 405 U.S. 319, 321 (1972) ("racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the necessities of prison security and discipline." (internal quotation marks omitted)); *see also In re Long Term,* 174 F.3d 468 (4th Cir., 1999) ("[e]ven assuming that analogous action outside the prison context would violate the Constitution, 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *quoting Turner v. Safley,* 482 U.S. 78, 89 (1987)).

Plaintiff contends that Defendants violated his constitutional rights in 1987, when he was initially housed

in the prison, whereby he was housed with an inmate of his own race. Plaintiff supports his position with the case of *Sockwell v. Phelps,* 20 F.3d 187 (5th Cir. 1994). There, the Fifth Circuit Court of Appeals, addressing a Louisiana prison, held that although the prison could segregate those who had engaged in racial violence, the prison's justification were generalized fears, insufficient to support segregation of all two-man cells.

First, *Sockwell* does not address the Supreme Court's holding in *Turner v. Safley* (*supra*). *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights. *See Turner,* 482 U.S. at 85 ("Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights'"). *Turner* set forth a new standard to evaluate all constitutional claims brought by inmates: Because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *Turner,* 482 U.S. at 84 (internal quotation marks omitted), the Supreme Court has held a prison regulation [that] impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests: *See, id.* at 89. This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny. *Turner v. Safley* at 89.

In determining whether a prison policy is constitutional, the Court considers four factors: (1) whether there is a valid, rational connection between the policy and the penological

interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Turner,* 482 U.S. at 89-90; *accord Mauro v. Arpaio,* 188 F.3d 1054, 1058 (9t[h] Cir.1999) (en banc).

Unlike *Sockwell,* concerns by Defendants with respect to the housing of inmates during classification are not based on "generalized fear" of racial violence. They are based on knowledge of gang rivalries predominating in high security prisons which have resulted in serious injury and death. (Exhibit 4, Excerpts of Schulteis's Deposition, pp. 58:6 - 59:4.) It is prison officials concern that gang rivals are not housed together. For example, Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related, conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. (Decl.of Associate Warden O'Neill, attached as Exh. 1.) As background, on June 1, 1998, a riot occurred on the Facility A yard which involved 39 Northern and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months. (Exh. 1, ¶ 4.)

In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity as well as the likelihood that this violence would continue resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions. (*Id.*, ¶ 5.) On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay. (*Id.*, ¶ 6.) On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this. (*Id.*, ¶ 7.) On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved in this. The inmates were placed on lockdown until April 14, 1999. (*Id.*, ¶ 8.) On August 31, 1999, a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates. (*Id.*, ¶ 9.) On September 9, 1999, a racial disturbance occurred on the Facility A yard involving 7 Black and 4 White inmates. (*Id.*, ¶ 10.) On September 27,1999, a riot occurred on the Facility A yard involving 30 Black and 3 White inmates. (*Id.*, ¶ 11.) A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates, and finally with both groups together. This resulted in full programing for these groups on the Facility A yard. (*Id.*, ¶ 12.) A similar

approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted. (*Id.*, ¶ 13.) On February 23, 2000, however, there was a riot on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with .223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals. The institution was placed on lockdown. (*Id.*, ¶ 14.)

On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number or riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation. (*Id.*, ¶ 15.) On August 25, 2000, information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits.

At the conclusion of the search, and upon review of the information, It was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay. (*Id.*, ¶ 16.) At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence. (*Id.*, ¶ 17.)

There has been no evidence produced by Plaintiff that these problems could have been avoided if he or other inmates were housed differently upon classification. As Mr. Cambra states in his declaration,

> Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the

problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (Exh. 3, ¶ 13.)

Mr. Cambra goes on, "Therefore, I feel it would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety." (Exh. 2, ¶ 14.)

Defendants have an obligation to protect inmates from potential danger. This was also not addressed by *Sockwell.* In *Farmer v. Brennan,* 511 U.S. 825 (1994), the Supreme Court held that under the Eighth Amendment, prison officials have a duty to "provide humane conditions of confinement

. . . [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates . . ." *Id.* at 831. In general, a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment. *Farmer v. Brennan,* 511 U.S. 825, 827 (1994). To make out a claim of deliberate indifference to the threat of serious harm or injury by another prisoner, the plaintiff must assert that the deprivation of his or her rights was "objectively, sufficiently serious." *Farmer,* 511 U.S. at 834. Second, where the claim at issue is predicated upon the failure to protect, the deprivation is deemed to be sufficiently serious if there was a substantial risk that the prisoner would suffer serious harm. *Id.* As the declarations of Mr. Cambray, Mr. O'Neil and Ms. Schulteis (Exhibit 3) point out, they make their housing decisions with the paramount concern being safety.

The Supreme Court has consistently stated that prison administrators should receive wide-ranging deference in the adoption and execution of policies and practices that are needed to preserve the internal order and discipline of institutional security. *Bell v. Wolfish,* 441 U.S. 520 (1979). There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, "by definition," is made up of persons with "a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer,* 468 U.S. 517, 526 (1984); *Washington v. Harper,* 494 U.S. 210, 224 (1990.)

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Compatability Policy

"The policy of the CDC is that inmates pick their cellmate with whom they are compatible. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race." (Exh. 3, ¶ 13.) This is a policy designed around inmates finding a compatible cellmate. (*Id.*)

In this case, Plaintiffs cell-mate is Mr. Stubbs. (Pl's. Dep., p. 18:25-19:1[1]) Plaintiff cells with Mr. Stubbs because he finds they are compatible. (*Id.* at, pp. 19: 10-20: 6.) If Plaintiff found he was compatible with someone of a different race and wanted to house with that person, he could.[2] (Pl's Dep., p. 25: 11-18.) As the Director of the Department of Corrections, Mr. Cambra concurs, "[I]n my experience with the CDC, I have found that the ideal situation for a two-person cell is that an inmate finds another inmate with whom he or she is compatible and both inmates indicate to their prison housing staff of their request to be housed together. (Exh. 3, ¶ 15.)

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1. Plaintiff's deposition was lodged with the Court on April 9, 2001.

2. By his deposition testimony, Plaintiff's statement that "he could" appears to be in the context that he would be agreeable to it. (See Plaintiff's Dep. p. 25: 11-13.)

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With this policy, Plaintiff has failed to demonstrate how Defendants have violated Plaintiff's constitutional rights. Plaintiff's motion for summary adjugication of issues should be denied.

III.

THERE IS NO EVIDENCE OF A CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff alleges that Defendants conspired against him. 42 U.S.C § 1985 prohibits individuals from entering into a conspiracy to deprive an individual of his civil rights. Under the clauses of section 1985, an allegation of racial or class-based animus is an essential element of the claim. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir.1987). To establish such animus, a plaintiff must show an "invidiously discriminatory motivation . . . behind the conspirators' action." (*Id.*, at 561)

Further, a conspiracy allegation does not give rise to section 1983 liability unless there is an actual deprivation of civil rights. *Woodrum v. Woodward* County, *Okl.*, 866 F.2d 1121, 1126 (9th Cir.1989); *Escamilla v. City of Santa Ana,* 606 F. Supp. 928, 934, *affd.*, 796 F.2d 266 (1985).

In this case, Plaintiff has not produced evidence of class-based animus. There has been no violation of a constitutional right and no facts of conduct by Defendants in furtherance of a conspiracy to violate Plaintiff's constitutional rights. Summary judgment should be granted in favor of Defendants on Plaintiff's claim of conspiracy.

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IV.

DEFENDANTS ARE NOT LIABLE IN DAMAGE TO PLAINTIFF

Defendants Gomez and Rowland are sued in their individual capacity. As to Defendant Cambra, this Defendant is sued only in his official capacity. (Fed.R.Civ.P. 25.) Insofar as Plaintiff seek to sue the CDC official or employee in their official capacities, the suit is barred by the Eleventh Amendment. *See, Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984) (holding that state agencies are "states" for the purposes of the Eleventh Amendment); *Regents of the University of California v. Doe,* 519 U.S. 425, 429 (1997); *see also Hafer v. Melo,* 502 U.S. 21 (1991) ("State officers sued for damages in their official capacity are not 'persons' for the purposes of the suit because they assume the identity *of* the government that employs them. By contrast, officers sued in their personal capacity come to court as individuals.") A suit for damages against a state official in his official capacity is barred by the Eleventh Amendment. *See, Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 101 (1984).

As to damages against Defendants Gomez and Rowland, Plaintiff's complaint contains no factual allegations concerning Mr. Gomez and Mr. Rowland's personal involvement in his claim. Plaintiff has never asked either Defendant if he could cell with an inmate from another race and his request was never denied. (Plaintiff's dep. p, 39: 2-5; p. 45: 9-14; p. 45: 17-18.) A Section 1983 claim cannot be

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sustained on a theory of respondeat superior. *See Rizzo v. Goode,* 423 U.S. 362, 376-77 (1976); *Redman v. County of San* Diego, 942 F.2d 1435, 1446 (9th Cir.1991).

Moreover, Plaintiff has not demonstrated how he has been injured. *Lewis v. Casey,* 518 U.S. 343, 349 (1996), clarifies the standing requirements for a constitutional challenge by reminding the Court that "the Constitution requires a plaintiff to demonstrate actual injury in order to have a federal court adjudicate a claim and allows no exception in prison-conditions cases." *Lewis,* 518 U.S. at 349-352. The Court explained that the requirement that an inmate show "actual injury" derives from the constitutional principle of standing. *Lewis,* 518 U.S. at 349. If a claimant does not have standing, he is barred from bringing suit and the federal court is without jurisdiction to hear the claim. *See Allen v. Wright,* 468 U.S. 737, 750-52 (1984). "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey,* 518 U.S. at p. 349. Further holding that, "it is not the role of courts, but that of political branches, to shape institutions of government in such fashion as to comply with the laws and the constitution." (*Id.*); *see also Raines v. Byrd,* 521 U.S. 811, 818 (1997) (standing requires a legally and judicially cognizable injury).

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V.

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

It is well established that in order to justify a grant of a permanent injunction the movant has the burden of establishing (1) that the court's exercise of equity jurisdiction is proper, *Younger v. Harris,* 401 U.S. 37, 43-44 (1971); (2) that the movant has succeeded in proving the merits of its case, *Cib-Geigy Corp. v. Bolar Pharmaceutical Co.,* 747 F.2d 844, 850 (3rd Cir. 1984); and (3) that the balance of equities tips in favor of injunctive relief. Id. The basis for injunctive relief in the federal courts is a showing of irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982).

In this case, Plaintiff does not demonstrate that he has been injured. (See discussion section IV.) In this case, the balance of the equities does not justify injunctive relief. Plaintiff is not an inmate who is being classified into the prison, rather he has been imprisoned since 1987. Plaintiff is encouraged to house with an inmate with whom he is compatible and Plaintiff has done just that. Plaintiff has never asked to house with an inmate from another race and a request has never been denied. Even if it had been denied, Plaintiff could pursue the prison's administrative remedies. There is no injunctive relief to which Plaintiff is entitled. Plaintiff s request for summary adjudication of issues should be denied.

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VI.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Prison officials, performing discretionary functions within the limits of their duties, receive a qualified immunity from damages in Civil Rights actions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette,* 434 U.S. 555, 561-562, 98 S. Ct. 855 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819, 102 S. Ct. 2727 (1982). The purpose of this rule is to permit such officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Id.* at 819; *Kraus v. County of Pierce,* 793 F.2d 1105, 1108 (9th Cir. 1986). "As the qualified immunity defense has evolved, it provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). An official is denied qualified immunity only if the law was clearly established and a reasonable official could not have believed that his conduct was lawful. *Somers v. Thurman,* 109 F.3d 614, 617 (9th Cir. 1997).

Thus, in deciding whether an official is entitled to qualified immunity, the court must inquire: (1) whether the law governing the officials' conduct was clearly established at the time of the alleged violation; and (2) under the law, whether a reasonable official could have believed the conduct did not violate an identifiable right. *See Act Up!/Portland v.*

Bagley, 988 F.2d 868, 871-72 (9th Cir.1993). The inquiry focuses on whether a reasonable official in the position of any of the defendants could have believed that his conduct in question was lawful. *See id*, at 872. Additionally, the Ninth Circuit has stated that,

> The question of whether a reasonable [official] could have believed [that his conduct was lawful] is 'an essentially legal question' . . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed; a district court must determine the issue on motion for summary judgment.

See id., at 873 (citation onutted).

In this case, there was no violation of a clearly established law. Moreover, Defendants could have reasonably believed that their conduct was lawful under the established legal principles. Under *Lee v. Washington*, 390 U.S. 333, 334 (1968) prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." In this case, there is no evidence that Defendants have acted otherwise. Thus, Defendants are entitled to qualified immunity. *See Act Up!/Portland*, 988 F.2d at 871-72.

CONCLUSION

Based on the foregoing, Plaintiff's Motion for Summary Adjudication of issues should be denied and summary judgment should be granted in favor of Defendants Rowland, Gomez and Cambra and against Plaintiff.

DATED: April 23, 2001

BILL LOCKYER
Attorney General

PAUL GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

/s/ Sara Turner
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

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EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF PELICAN BAY STATE PRISON ASSOCIATE WARDEN B. O'NEILL

I, B. O'NEILL, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 21 years. Presently, I am an Associate Warden at Pelican Bay State Prison ("Pelican Bay").

2. One of my duties involves overseeing the "general population" yards at Pelican Bay. The general populations yards include the Facility A and B yards, which house several thousand level-IV inmates.

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3. Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related, conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. At the request of the Office of the Attorney General, and in preparation for this declaration, I reviewed my synopsis of the history of his lockdown that I previously prepared as briefing for the Warden.

4. As background, On June 1, 1998, a riot occurred on the Facility A yard which involved 39 Northern and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months.

5. In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity as well as the likelihood that this violence would continue resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions.

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6. On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay.

7. On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this.

8. On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved in this. The inmates were placed on lockdown until April 14, 1999.

9. On August 31, 1999; a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates.

10. On September 9, 1999, a racial disturbance occurred n the Facility A yard involving 7 Black and 4 White inmates.

11. On September 27,1999, a riot occurred on the Facility A yard involving 30 Black and 3 White inmates.

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12. A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates, and finally with both groups together. This resulted in full programing for these groups on the Facility A yard.

13. A similar approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted.

14. On February 23, 2000, there was a riot on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with. 223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals. The institution was placed on lockdown.

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15. On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number or riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation.

16. On August 25, 2000, information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits. At the conclusion of the search, and upon review of the information. It was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay.

17. At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of April, 2001, at Crescent City, California.

s/ Barry O'Neill
Barry O'Neill, ASSOCIATE WARDEN
PELICAN BAY STATE PRISON

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EXHIBIT 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DECLARATION OF S. CAMBRA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Steven Cambra, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 30 years. Presently, I am the acting Director of Corrections.

2. In addition to serving as the Director of the Department of Corrections, I have served as a Regional Administrator for the CDC. In addition to

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these capacities, I have served as a Warden, an Associate Warden, a Captain, Lieutenant, Sergeant and Correctional Officer.

3. I have worked with inmates in all housing security levels. As the Regional Administrator, I oversaw the prison institutions within my Region. As the Acting Director, I oversee all of the prisons.

4. I am familiar with the CDC's policies and practices with respect to housing decisions. Inmates are housed double-celled (two inmates per cell) or in dormitories. With respect to double-celling, a critical goal on the part of prison officials is that this be done in a manner to maintain the inmates' individual safety as well as the safety of the staff and the institution as a whole.

5. An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to his physical, mental and emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests.

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6. The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates who he may have had disputes with during previous prison placements.

7. With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation.

8. In addition to the factors identified in paragraph 7, above, race is considered during the initial double-cell housing classification decision.

9. The reason race is a consideration in an initial housing decision is, based on CDC's experience, that CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out

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to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior.

10. Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else.

11. If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused.

12. After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement.

13. Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. If race were to be disregarded entirely; however, I am certain,

based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell.

14. Therefore, I feel that not considering race in an initial housing decision would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety.

15. In my experience with the CDC, I have found that the ideal situation for a two-person cell is that an inmate finds another inmate with whom he or she is compatible and both inmates indicate to their prison housing staff of their request to be housed together. In light of this goal, I would not recommend that race not be considered in the initial housing decision.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of April 2001, at Sacramento, California.

s/ Steven Cambra
STEVEN CAMBRA, DIRECTOR (A)
CALIFORNIA DEPARTMENT
OF CORRECTIONS

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EXHIBIT 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV -95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF L. SCHULTEIS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Linda Schulteis, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for twenty-four years. Presently, I am an Associate Warden at the California State Prison for Los Angeles County located in Lancaster ("CSP-Lancaster").

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2. In addition to serving as an Associate Warden, I have served as a Captain Lieutenant, Sergeant and Correctional Officer.

3. In my present capacity as an Associate Warden, among my duties, I oversee the Receiving and Release ("R & R") section of CSP-Lancaster and am responsible for the aspect of the prison which assigns inmates to cells upon initial arrival at this institution.

4. CSP-Lancaster is a high security, Level III and IV prison. When inmates are received into the prison, it is essential that they are promptly assigned a bed. A report generated by the Control Sergeants indicates which beds are currently empty.

5. If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of his same ethnic race. In addition, we also look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group.

6. We also try to house an inmate with an inmate close to his own age. Also, for example, we attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. We also consider other factors such as, but not limited to, enemy concerns, custody level and classification.

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7. We make housing decisions in the manner described above because we have found that it will be the least likely to lead to conflict among the prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard.

8. With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. We attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past

9. As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together.

10. However, as to the initial housing assignment, if we were not to consider race and gang affiliation in the initial double-cell housing decision, I am certain that there will be conflicts both in the cells and the conflict will flow onto the yards. Although we would rather the inmate population not focus on these areas in a manner leading to conflict, we find that the inmates do place a weight on the issue. I believe this focus is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells.

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11. At CSP-Lancaster, if we were to disregard the initial housing placement being done in the manner set forth in paragraph five, then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them.

12. I am therefore not willing to knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate or group of inmates safety by taking steps that I know would result in violence and conflict. My responsibility is to preserve the safety and security of the institution, inmates and staff and given that responsibility, I would therefore not ignore a known issue impacting safety.

13. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race.

14. This is a policy designed around inmates finding a compatible cellmate. We get hundreds of these requests and almost all are granted This policy has compatibility as the goal, and it operates effectively,

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is encouraged and results in the lowest potential for conflict or violence among the inmates which is the desired goal of prison administrators.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6 day of April, 2001, at Sacramento, California.

s/ L. Schulteis AW
L. SCHULTEIS, ASSOCIATE WARDEN
CSP-LANCASTER

Appendix L

EXHIBIT 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO. CV-95-01192-CBM (BOR)

GARRISON S. JOHNSON, AN INDIVIDUAL,

PLAINTIFF,

VS.

STATE OF CALIFORNIA; JAMES H GOMEZ; AN INDIVIDUAL; JAMES ROWLAND, AN INDIVIDUAL; AND DOES 1 THROUGH 20, INCLUSIVE,

DEFENDANTS.

DEPOSITION OF: LINDA SCHULTEIS

TAKEN ON: WEDNESDAY, DECEMBER 6, 2000

CERTIFIED COPY

Q. I'D LOVE TO ASK MORE QUESTIONS ABOUT THAT, BUT I'M AFRAID IT WOULD BE HIGHLY IRRELEVANT TO THIS CASE.

MS. TURNER: PROBABLY NOT.

BY MR. HILGER:

Q. HOW ABOUT THE NAZI LOW RIDERS?

A. ALL OF THE GANG FACTIONS PLAY A PART IN THE PRISON CULTURE, WHICH IS WHY WE HAVE TO CAREFULLY PLACE INMATES IN CELLS WITH EACH OTHER. A LOT OF THE GANG CULTURE IS THAT DO NOT TALK TO STAFF. DON'T TELL THEM WHAT YOU'RE ABOUT OR WHAT'S HAPPENING. SO STAFF HAVE TO BE VERY PERCEPTIVE. AND OUR PRACTICE OF PUTTING — YOU KNOW, MATCHING RACES IN A CELL PREVENTS MORE PROBLEMS THAN IT STARTS.

Q. OKAY. ISN'T IT TRUE, THOUGH, THAT IF YOU PUT A BLACK WITH A WHITE, THERE'S NO CHANCE OF THEM BEING FROM RIVAL GANGS?

A. THEY COULD BE FROM RIVAL GANGS. LIKE IF YOU PUT A BGF IN WITH AN ARYAN BROTHERHOOD, SOMEBODY WILL DIE.

Q. WHEN THEY GET THIS INITIAL LIST, THE 135, THERE'S NO GANG AFFILIATION INFORMATION ON THAT LIST?

A. NO, THERE IS NOT.

Q. WHEN DO THE PRISON OFFICIALS FIND OUT ABOUT THE GANG AFFILIATION?

A. RIGHT THERE IN R & R. IT IS THE RESPONSIBILITY OFF DUTY HOURS FOR THE SERGEANT OR THE SUPERVISOR THAT'S ON DUTY OUT OF THE WATCH TO REVIEW THE FILE, TO REVIEW WHAT WE CALL AN 812, THE CDC-812 TO SEE IF THERE IS ANY GANG AFFILIATION.

Q. AND IF THERE IS, THEN THAT'S TAKEN INTO ACCOUNT IN THE HOUSING ASSIGNMENT?

A. THAT'S FIRST AND FOREMOST.

Q. BUT ONLY FOR CELLS? NOT FOR DORMS?

A. WE WOULDN'T PUT A VALIDATED GANG ASSOCIATE OUT INTO ANY OF THE DORMS.

MS. TURNER: DO YOU HAVE ANY THAT ARE VALIDATED HERE?

BY MR. HILGER:

Q. I'M SORRY. WHAT DOES VALIDATED MEAN?

A. IT HAS HAPPENED.

WHERE IN THEIR FILE THEY'RE LISTED AS A VALIDATED ASSOCIATE.

Q. WHO MAKES THAT DETERMINATION?

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A. THE GANG INVESTIGATOR, THE LIEUTENANT. AND IT HAS HAPPENED. IT HAS HAPPENED. WE RECEIVED AN INMATE WHO WAS A VALIDATED MEXICAN MAFIA ASSOCIATE FROM THE MEDIUM CORRECTIONAL FACILITY. THE PAPERWORK HAS TO GO THROUGH A SCRUTINY UP THROUGH SACRAMENTO UP THERE SSU.

Q. WHAT IS SSU?

A. SPECIAL SECURITY UNIT.

APPENDIX M — MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED APRIL 23, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with (1) Motion to Strike Based on Evidentiary Objections, and (2) Response to Statement of Uncontroverted Fact and Statement of Genuine Issues]

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

[Tables of Contents and Authorities Intentionally Omitted]

Appendix M

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There is a terrible and invalid assumption that permeates all of the Defendants' summary judgment papers: that all members of a particular race will act in the same manner when confronted with similar circumstances. Defendants rely freely on this racial branding while admitting to a policy of segregating new inmates by funneling them into double cells with inmates of the same race. When applied to an African-American inmate such as the Plaintiff, Defendants' policy is based on the fear that all black prisoners would become violent if initially assigned to a cell with a non-black prisoner.

In moving for summary judgment, Defendants attempt to justify their policy by pointing out that it is applied to all inmates regardless of race (i.e., whites are also housed only with whites). See Defendants' Memo. at p. 13:21-25. Thus, Defendants ask this court to support a "separate but equal" policy of race-based segregation, an anachronistic doctrine first permitted by *Plessy v. Ferguson*, 163 U.S. 537 (1896), but long ago stricken down by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Defendants attempt to rationalize their stance based on the factually unsupported assertion that such a policy is necessary to ensure safety. However, this same claim has been consistently rejected by the courts, and was eloquently dealt with by a Nebraska district court in an early decision which prohibited racial segregation in a prison facility:

> Threats of recalcitrant prisoners whose racial prejudices are erected to defy the constitutional

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> rights of black prisoners need to be quashed. The prisoners who threaten violence, rather than those who seek their right to nondiscriminatory treatment, should be the ones to feel the weight of the consequences of their overt bigotry.

McClelland v. Sigler, 327 F. Supp. 829, 834 (D. Neb. 1971), *affirmed* 456 F.2d 1266 (8th Cir. 1972). *Accord Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (holding policy of segregating two-man cells unconstitutional despite a claimed potential for violence, finding that "[i]f violent disruptions did occur, we would expect the prison officials to take appropriate action against the offending prisoners, black or white."). Defendants have presented no credible or legitimate evidence that their policy of racial segregation creates a safer environment or supports any legitimate penological interest. Lacking any evidentiary support, Defendants' policy is invalid under the equal protection clause of the Fourteenth Amendment.

Defendants' remaining arguments are similarly flawed. Plaintiff has standing to bring these claims because in governmental segregation cases it is enough to show that the plaintiff uses the facilities at issue. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *affirmed* 390 U.S. 333 (1968). With respect to Plaintiff's conspiracy claim, the declarations and deposition testimony speak loudly to demonstrate an agreement among the Defendants to deprive Plaintiff of his civil rights based on an invidious intent to discriminate -- at a minimum, there is a triable issue of fact on this point. Injunctive relief is not only proper, but necessary here to ensure that the Defendants discontinue a policy that violates

the Constitution. Plaintiff will demonstrate at trial in support of his Eighth Amendment claim that Defendants' policy has fostered an environment of racial hostility and increased racial animus that has subjected Plaintiff to an excessive level of violence among inmates which, in turn, has jeopardized Plaintiff's personal safety. Finally, Defendants' claim to qualified immunity must be rejected, as it has been in all other recent decisions involving racial segregation in prisons, because the law prohibiting such segregation in prisons has been clear and well established for many years. Defendants' motion should be denied in its entirety.

II. PLAINTIFF HAS STANDING TO SEEK RELIEF FOR FORCED SEGREGATION IN CELL ASSIGNMENTS

In cases involving racial segregation in prisons, residents of the affected facility plainly have standing to complain about such a practice. Specifically, the Supreme Court affirmed a district court decision in *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), holding that one white and five black citizens who were, or had been, incarcerated in an Alabama facility had standing to sue for violations of their rights under the Eighth and Fourteenth Amendments. The plaintiffs in Lee asserted that the statutes enacted by the Alabama Legislature "requiring segregation by race in the state, county and city penal facilities" were unconstitutional. *Id.* at 329.

The defendants in *Lee* contended that two of the plaintiffs did not have standing because they were no longer incarcerated. The Court disagreed: "The general standing requirement in cases involving governmental segregation is

that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." *Id.* at 329 (citation omitted). In order to challenge a practice of racial discrimination in the prison, the plaintiffs were required to show only that "the operation of these institutions, as that operation presently exists, '[permits] the recurrence of comparable violations.'" *Id.* at 330 (quoting *Henderson v. United. States*, 339 U.S. 816 (1950) (alteration in original). Certainly, if the plaintiffs in Lee had standing where they were no longer incarcerated, then Plaintiff here has an even greater right to challenge an unconstitutional practice of racial segregation.

Similarly, in *McClelland*, 327 F. Supp. at 829-30, two plaintiffs incarcerated in the Nebraska Penal and Correctional Complex filed a complaint alleging violation of their civil rights because blacks were systematically excluded from being housed in one of the two housing cells. The court held that the plaintiffs, one white and the other black, had standing because "both have resided in the general living units but [the black plaintiff] has never been permitted to reside in the East Cell House" (the cell from which blacks were excluded). *Id.* at 835. The court did not need to examine whether the black plaintiff had in fact requested to be housed in the East Cell House.

Defendants claim that Plaintiff is unable to demonstrate he has been harmed because "Plaintiff does not indicate that, because of his race, he has received any lesser or greater privileges or benefits than any other inmate." Defendants' Memo at p. 9:25 -10:1. Defendants' "separate but equal" argument, that so long as all inmates are similarly segregated

by race in double cells then Plaintiff cannot complain of injury stemming from disparate treatment, is not only flagrantly unconstitutional, it is preposterous. The fact that Plaintiff s injury is shared by all minority inmates is not a basis to deny standing.[1]

---

1. In addition, Plaintiffs ongoing psychological injury resulting from racial segregation as a basis for standing should be unquestioned in the aftermath of *Brown v. Board of Education*, in which the Supreme Court noted the injury necessarily flows from racial segregation:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> > "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn."

Brown, 347 U.S. at 493-94 (quoting from the district court in *Brown*, 98 F. Supp. 797). Here, as in *Brown*, Plaintiff's exposure to state sanctioned racial stereotyping is sufficient injury to confer standing. At a minimum, Plaintiff's ability to be rehabilitated is being interfered with by such a policy. *See McClelland v. Sigler*, 327

(Cont'd)

Lewis v. Casey, 518 U.S. 343 (1996), cited by the Defendants, held that prisoners had no actual injury in being denied access to the courts as a result of the prison facility maintaining an inadequate law library. *Lewis* does not examine any claim of racial segregation or injuries stemming from such claims, and provides no support for Defendants' argument on standing. Plaintiff has standing to bring these claims, and Defendants' motion for summary judgment on this basis should be denied.

III. DEFENDANTS' ADMITTED POLICY OF USING RACE-BASED ASSUMPTIONS IN MAKING INITIAL CELL ASSIGNMENT DEMONSTRATES THAT PLAINTIFF IS ENTITLED TO JUDGMENT ON HIS FOURTEENTH AMENDMENT CLAIM AS A MATTER OF LAW

The United States Supreme Court has plainly — and repeatedly — held that "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the necessities of prison security and discipline." *Lee*, 390 U.S. at 334; *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (also holding that prison authorities may only segregate in "particularized circumstances" of racial tension). In the face of this unwavering principle, Defendants'

(Cont'd)

F. Supp. at 831 ("[t]hat the setting is a state penal complex, rather than a state school, affords no ground for a materially different effect"); *see also*, *Ybarra v. City of San Jose*, 503 F.2d 1041, 1044 (9th Cir. 1974) (plaintiffs complaining of racial segregation in schools had standing based on causal relationship between "the injury," school segregation, and discriminatory zoning ordinances).

sole excuse for their undisputed policy of segregation is that such a policy is necessary to preserve security and discipline in California prisons. Defendants' arguments lack merit for two reasons: (1) they are based on nothing more than unfounded and conclusory suppositions which hold no evidentiary weight; and (2) they are contrary to well-established precedents that racial segregation in prisons is unconstitutional.

A. Defendants Supply No Rational Basis For Their Policy of Racial Segregation.

Defendants have offered this Court no definitive, reliable evidence that their automatic segregation of new prisoners by race is justified by legitimate security or disciplinary concerns. Defendants, instead, rely on the conclusory declarations of two prison administrators, who offer nothing more than conjecture and supposition that having integrated double cells would promote racial violence.[2] Neither of Defendants' declarants support their testimony with any statistical studies, expert analysis, data from other prison systems which have integrated prisoners, or even any fact-based anecdotal experience from California prisons. Instead, their conclusions are based solely on their personally held beliefs. But these beliefs should be viewed by the court as profoundly unreliable given their deposition testimony admitting that, for the past 24 years during which California has segregated its double person cells, neither of these

2. Plaintiff's Motion to Strike Based on Evidentiary Objections to Declarations and Exhibits Offered in Support of Defendants' Motion for Summary Judgment ("Motion to Strike") is filed concurrently with this Opposition.

administrators has any experience showing that a racially integrated cell has caused prison violence. *See*, *e.g.*, Motion to Strike at 6-11, directed at ¶¶ 13-15 of the Declaration of Steven Cambra ("Cambra Decl."); and Motion to Strike at 11, 13, 15, 16, and 18, directed at ¶¶ 7, 10, 11, 12 and 14 of the Declaration of Linda Schulteis ("Schulteis Decl."). Nearly identical testimony and lack of proof served as the basis for granting injunctive relief in *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979), discussed in detail *infra*. The declarants' suppositions that state prisoners prefer to be segregated are also made without any factual support and are equally conclusory. (*See*, *e.g.*, Motion to Strike at 3, directed at Cambra Decl., ¶ 9; and Motion to Strike at 14, directed at Schulteis Decl., ¶ 10.)[3]

Defendants admit that prisoners are integrated in dormitories without a pattern of racial violence. (*See*, *e.g.*, Schulteis Decl., ¶ 8.) Defendants also admit that they have existing mechanisms available to them whereby individual prisoners who express incompatibility with their cell mates, or who believe their cell mates pose a danger to their safety,

3. Indeed, courts have not hesitated to reject conclusory affidavits submitted by prison officials which over-generalize prisoners' thoughts or the legitimacy of certain prison regulations. *See*, *e.g.*, *Turiano v. Schnarrs*, 904 F. Supp. 400, 406-407 (M.D. Pa. 1995) (striking prison officials' conclusory affidavits of prisoners' thoughts, holding that "the personal knowledge requirement [of F. R. Civ. Proc. Rule 56(e)] means that affidavits must be devoid of hearsay, *conclusory language and statements which purport to examine thoughts as well as actions*") (emphasis added); and *Weaver v. Jago*, 675 F.2d 116, 118 (6th Cir. 1982) (rejecting as conclusory prison officials' unsupported affidavit that prison's hair length regulations are necessary for security, hygiene and safety).

may request transfers to other cells. (*See*, *e.g.*, Cambra Decl., ¶¶ 10-11; and Schulteis Decl., ¶¶ 13-14.) In fact, defendants admit that, even with segregation, Defendants "get hundreds of these [transfer] requests," which are routinely granted. (Schulteis Decl., ¶ 14.) Defendants cannot deny that these very same procedures could be used to cure *individual* instances of racial conflict among integrated cell mates. Therefore, a blanket segregation of prisoners based on race is unnecessary, unconstitutional and inexcusable.[4]

Defendants repeatedly point to the "other factors" that they use in making initial cell assignments as a means to argue, presumably, that race is merely one of several factors. But it is clear from Defendants' memorandum (e.g., at p. 15:11-13) and testimony (e.g., Schulteis Decl., ¶5) that race is a predominant and deciding factor. The fact that gang affiliation, security risk, and other factors are also considered by the Defendants does not support an argument that racial stereotyping is necessary in making safe cell assignments; to the contrary, the presence and consideration of these other factors demonstrates that other criteria is available to the prison administrators, having nothing to do with race, which assists in avoiding violent conflict within the double cells. Yet, Defendants persist in segregating these cells based on race and ethnicity.

---

4. Defendants' assertion that racial integration is not feasible because double cells are more difficult to monitor, (Cambra Decl., ¶ 13), begs the question, as those same difficulties presently exist in segregated cells. The problem is not with the prisoners' races, but either in the design of the cells or Defendants' monitoring capabilities and procedures.

Given Defendants' apparent inability to support their motion with admissible evidence, Defendants' motion for summary judgment must fail.

B. Defendants' Use of Race-based Criteria to Segregate Prisoners Has Uniformly Been Held Unconstitutional.

Following the Supreme Court's decision in *Lee*, *supra*, courts have almost invariably refused to permit segregated prison housing, and have only allowed segregation in particularized instances where segregation of individual prisoners has been shown to be necessary by prison authorities. *See*, *e.g.*, *Blevins v. Brew*, 593 F.Supp 245, 248 (W.D.Wisc.1984) (holding that the "prison security and discipline exception is a narrow one").

However, no court has held that blatant, broad-based racial segregation, of the type Defendant has admitted to, is constitutional. Case after case has ruled that this type of racial discrimination violates the Fourteenth Amendment. *Blevins*, 593 F.Supp. at 248 (double celling of inmates based on race violated plaintiff's constitutional right to equal protection under the law); *Sockwell*, 20 F.3d at 187 (general policy of segregating two-person cells based upon race violated equal protection); *Lamar v. Kern*, 349 F.Supp. 222, 224 (S.D.Tex.1972) (system where one wing of a prison is consistently filled with black prisoners is not a color-blind system and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment); *McClelland*, 327 F.Supp. at 830 (segregated prison facility violated the Fourteenth Amendment notwithstanding testimony of prison officials

that disturbances would accompany desegregation); *United States v. Wyandotte County*, 480 F.2d 969, 971-972 (10th Cir.1973) *cert. denied Wyandotte County v. United States*, 414 U.S. 1068 (segregation of blacks to East tank and whites to West tank violated the Fourteenth Amendment, noting that "[t]he argument that desegregation of public facilities might provoke violence has never been accepted to justify unconstitutional segregation").

When a prison regulation impinges on inmates' constitutional rights, as here, the regulation is invalid unless the regulation is shown to be reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under *Turner*, four factors are relevant: First "there must be a 'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." If the connection between the regulation and the asserted goal is "arbitrary or irrational," *then the regulation fails*. *Id*. at 89-90.

Only if the policy or regulation passes this first test, should the court consider three other factors: (1) the existence of alternative means for prisoners to exercise the asserted constitutional right; (2) the impact that accommodation of the asserted right will have on guards, other inmates and on the allocation of prison resources generally; and (3) the absence of ready alternatives. *Id*.

1. Defendants Have Failed to Establish any Rational Connection Between Racially Segregated Cells and Prison Violence that would Justify The Use of Race-Based Criteria in Cell Assignments.

The justifications for racial segregation advanced by Ms. Schulteis and Mr. Cambra on behalf of the CDC are virtually identical to the explanations given by the wardens, and rejected by the courts, in *Sockwell*, 20 F.3d 187 and *Stewart*, 473 F.Supp. 1185.

In *Sockwell*, the Court of Appeals for the Fifth Circuit expressly held that a general policy of racially segregating two-person cells at the Angola penitentiary violated the prisoners' rights to equal protection, despite the warden's contention that security and discipline concerns demanded such segregation. The Court explained that "a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation. . . . If violent disruptions did occur [as a result of cell housing integration,] we would expect the prison officials to take appropriate action against the prisoner, black or white." *Sockwell*, 20 F.3d at 191.

In *Stewart*, the Ohio prison administrators asserted, as Defendants do here, that the practice of segregation is justified by "the prison administration's desire to reduce the possibility of racial tension and potential violence which it fears will result from celling black and white inmates together. . . . [Because [the prison] is the initial reception center, . . . the administration has insufficient information

concerning the [prisoner's] background to integrate them in the two-man reception cells where officials fear racial bias might flair into violence." *Stewart*, 473 F. Supp. at 1187-88. The *Stewart* court rejected that rationalization, and held that it violated the Constitution:

> [I]t is equally clear that prisoners are not stripped of all constitutional rights at the prison gate. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). The Court must strike a proper balance. . . . Although defendants contend that . . . the practice of segregation . . . [is] necessary for institutional security, the Court is not persuaded that such measures are in fact required to preserve internal order and discipline or to maintain institutional security.

473 F. Supp. at 1187. The court also noted that it was "clear that segregation by cell is no more permissible than segregation on a broader basis, for example by block." *Id.* at 1189, n.4.

Defendant's vague and conclusory predictions of violence, not based on any particular incidents, but rather on their personal, unsupported, beliefs that integrating prisoners will by itself promote racial violence, places their racial segregation policy squarely within the holdings of *Sockwell* and *Stewart* which rejected such purported justifications for segregation. Tellingly, Defendants in their memorandum never once attempt to assert any basis for their use of racial criteria as a means to avoid prison violence. Instead, Defendants rely exclusively on the threat that would arise

from placing rival gang members into the same double cell, a threat that can be avoided based on non-racial screening criteria:

> Disabilities, enemies and gang affiliation and numerous factors are examined. . . . To ensure that they are not placing rival gang members together, there is a rationale connection between not housing inmates of potential gangs rivals [sic], together with maintaining the safety of the institution. Therefore Defendants are acting in a reasonable manner.

Defendants' Memorandum at pp. 15-16. There is no valid, rational connection between Defendants racial segregation policy and the prison system's security interests, and Defendants have completely failed to demonstrate any such connection. Accordingly, Defendants' policy is invalidated by the first *Turner* test "irrespective of whether the other factors tilt in [their] favor." *Shaw v. Murphy*, U.S. Supreme Court, No. 99-1613 (2001 Daily Journal D.A.R. 3755, 3757, April 19, 2001). Summary judgment should be granted to Plaintiff based on Defendants' failure to satisfy the first *Turner* test.

2. Defendants' Policy Permits No Means for Plaintiff to Avoid Living in a Facility Comprised of Racially Segregated Cells.

As indicated above, the Court need not consider the remaining *Turner* factors in light of Defendants' failure to demonstrate a rational connection between segregated cells and an decrease in prison violence. However, even if the court were to rule that Defendants passed the first, and essential, *Turner* test, the remaining three factors strongly favor the Plaintiff.

The first of these factors requires an examination of whether the inmate has available an alternative means to exercise the abridged constitutional right. Here, Plaintiff has an established right to be free from racial segregation. Yet Defendants admit to a policy that has for the last 24 years created an environment where Ms. Schulteis and Mr. Cambra cannot recall a single instance of new inmates being assigned to an integrated double cell. There is plainly only one means to free the California prison system from the shackles of double-cell racial segregation, and that is for Defendants to cease their policy. This first alternative *Turner* factor plainly favors the Plaintiff.

In analyzing this factor, Defendants cite to the fact that after an inmate is initially assigned to a cell with a member of his own race, the inmate may ask to be reassigned to live with someone of a different race. However, the alleged existence of a secondary policy permitting inmates to request an integrated cell does not alter the fact that a practice of segregation is being forced by prison administrators on all incoming inmates. Having institutionalized segregation, Defendants may not require inmates to demand an integrated cell if they want one; to the contrary, those who object to an integrated cell should have the burden of making such a request. In addition, Defendants cite to the fact that inmates who present less of a security risk are able to be housed in supposedly non-violent mixed-race dormitories. This again demonstrates Defendants' failure to link integration in housing with increased violence.

3. A Failure to Automatically Segregate Prisoners by Race Will Not Have a Detrimental Impact on Prison Resources.

On this factor, Defendants' entire argument rests on a premise that initial cell assignments made without regard to race will inevitably lead to increased violence. However, as demonstrated above, and in Plaintiffs' concurrently filed Motion to Strike and Evidentiary Objections, there is no evidentiary basis supporting this faulty premise. Absent this premise, there is no showing whatsoever that avoiding race-based criteria will cause a strain on prison resources. An equal argument can be made that it will ultimately save prison resources. Again, this second *Turner* factor tips in favor of the Plaintiff.

4. Avoiding an Increased Risk of Cell Violence Can be Achieved Without Using Race-Based Criteria.

Defendants profess as a goal the need to avoid violent encounters between bigoted inmates. Defendants admit to a detailed process of screening inmates upon intake into the prison facility. Accordingly, there is no articulated reason why Defendants cannot examine as part of their screening process, in addition to gang affiliation, whether a particular inmate has a psychological profile involving racial animus or a history of inter-racial violence. There is no need to make the unlawful assumption that all members of a particular race will become violent when housed with other races, and any such violent reaction should be dealt with as it would be in any other instance of unlawful prison violence. By altering

the screening criteria in this fashion away from a strictly race-based test, the same goals can be achieved.

"In order to justify segregation practices that infringe on the constitutional rights of inmates, prison officials must show that the practices were necessitated by extreme or exigent circumstances involving racial conflict." *Blevins*, 593 F.Supp. at 247 (citing to *United States v. Wyandotte County*, 480 F.2d 969). A generalized expectation of racial violence is not a sufficient justification for racial segregation. *Blevins*, 593 F.Supp. 245, 247. Application of the *Turner* factors reveals that Defendants have no penological justification for their generalized fear of racial violence. As all of the *Turner* factors tip strongly in favor of the Plaintiff, this Court should hold that Defendants have violated Plaintiffs right to equal protection under the Fourteenth Amendment of the United States Constitution. Defendants' motion for summary judgment should therefore be denied.

IV. BY ACTING TO FURTHER AN AGREED UPON POLICY OF USING RACE-BASED ASSUMPTIONS IN CELL PLACEMENT, DEFENDANTS HAVE DEMONSTRATED A CONSPIRACY UNDER 42 U.S.C. § 1985(3) TO DENY PLAINTIFF HIS CONSTITUTIONAL RIGHTS

Defendants' motion for summary judgment on Plaintiff's conspiracy claim is essentially based on their untenable argument that there has been no "actual deprivation of civil rights" and "no violation of a constitutional right." Defendants' Memorandum at p. 19. As demonstrated above, Defendants' policy of racial segregation is a clear violation of the United States Constitution.

Defendants properly point out that to prevail on a conspiracy claim, Plaintiff needs to establish "racial or class-based animus" by showing "invidiously discriminatory motivation" behind the actions of the Defendants. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Defendants have repeatedly admitted to an agreement among themselves, through their consistently applied policy, to discriminate in cell-assignments and segregate prisoners based on race. From this the court may certainly infer both "racial animus" and "invidiously discriminatory motivation." Indeed, a similar conspiracy claim was upheld in *Santiago v. City of Philadelphia*, 435 F. Supp. 136 (E.D. Pa. 1977). *Santiago* involved claims brought by juvenile residents of a youth detention facility, including a claim of racial segregation resulting from discriminatory placement. The *Santiago* court used a three-part test in holding that the plaintiffs had adequately made out a claim for a conspiracy to deprive them of their civil rights.

First, the *Santiago* court held that a conspiracy to deprive civil rights could be shown "based upon the allegations that the unconstitutional conditions and practices at YSC were due to policies and practices approved or accepted by" the facility executives and implemented by its staff. *Id.* at 155-56. Here, CDC's racial segregation policies and practices were plainly approved and accepted (and admitted in testimony) by Defendants.

Second, to show that the defendants were motivated by race or "'class-based, invidiously discriminatory animus'" the plaintiffs in *Santiago* needed to show discrimination against a well-defined group and that the discrimination:

"(1) affects a traditionally disadvantaged group (e.g. 'suspect classification'); (2) is irrational; or (3) unnecessarily burdens plaintiff's exercise of a 'fundamental' right. *Id.* at 156. As the plaintiffs in *Santiago* were a suspect class and segregated by race in the juvenile facility, this element was satisfied. *Id.* Similarly, here, Plaintiff is part of a suspect-class and has alleged that he has been segregated in violation of his constitutional rights. This is sufficient to meet the race-based, invidiously discriminatory animus, requirement.

Finally, the defendants must have committed overt acts in furtherance of the conspiracy. *Id.* at 155. In *Santiago*, this element was satisfied "by the actions of the staff who allegedly are enforcing practices and procedures approved by YSC management." *Id.* Again, Defendants have repeatedly admitted to overt acts in furtherance of CDC's racial segregation policies.

Under both *Usher* and *Santiago*, Defendants' motion for summary judgment on Plaintiff's conspiracy claim should be denied.

V. A TRIABLE ISSUE OF FACT PRECLUDES SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S EIGHTH AMENDMENT CLAIM

Plaintiff claims that Defendants' racial segregation policy has fostered an environment of racial hostility and increased racial animus that has subjected Plaintiff to an excessive level of violence among inmates which, in turn, has jeopardized Plaintiff s personal safety. Such a claim is cognizable under the Eighth Amendment. *Johnson v. State of California*, 207

F.3d 650, 655-56 (9th Cir. 2000) (and cases cited therein); *see also Leonardo v. Moran*, 611 F.2d 397, 398-99 (1st Cir. 1979) ("[p]rison officials have a duty under the 8th and 14th amendments to protect prisoners from violence at the hands of other prisoners"); *Jensen v. Clarke*, 94 F.3d 1191, 1197 (8th Cir. 1996) (system of inmate assignment to double cells increased the risk of harm to inmates in violation of the Eighth Amendment). In addition, physical injury is not required for a claim of "cruel and unusual" punishment; the infliction of psychological harm that Plaintiff has suffered as a result of the state's practice of racial segregation may constitute the "pain" necessary to permit a finding of an Eighth Amendment violation. *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).

That racial segregation leading to an increase in violence can permit a finding of "cruel and unusual punishment" is also supported by the case cited by Defendants, *Wilson v. Seiter*, 501 U.S. 294 (1991), wherein the Court states:

> *Some* conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need . . . for example, a low cell temperature at night combined with a failure to issue blankets.

Id. at 304. Here, Defendants' knowing allowance of a combination of racial segregation in initial cell assignments coupled with an increased potential for racially motivated

violence may rise to a level whereby Plaintiff is being purposefully deprived of "the minimal civilized measure of life's necessities." *Id.* at 297.

Plaintiff has not moved for summary judgment on his Eighth Amendment claim because triable issues of fact exist with respect to the Defendants' state of mind in permitting violent and racially divisive conditions to persist at the Lancaster facility despite the pendency of Plaintiff's law suit since 1995. *See Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir.), *cert. denied* 516 U.S. 916 (1995) (defendant needs to act with "deliberate indifference" to a prisoner in causing an Eighth Amendment violation). Defendants' motion for summary judgment on this claim fails to establish that no triable issue of fact exists on this claim. Indeed, an examination of Defendants' separate statement of alleged "uncontroverted facts" reveals not a single suggestion by Defendants that implementation of their racial segregation policy was not intended to create a racial divide at the facility. Moreover, many of Defendants' statements demonstrate that a triable issue of fact exists on this point. *See, e.g.*, Declaration of S. Cambra at p. 4:24-27 (recognizing "problems we have on the yards . . . with respect to racial conflicts including riots, which have lead to serious injury and deaths"); Deposition of Linda Schulteis at p. 27:1 - 28:9 (Ex. C to Declaration of Jeff Hilger in support of Plaintiff's Motion for Summary Judgment) (describing generally the evolution of racial divides in prison facilities). In light of these statements, Defendants cannot prevail on summary judgment.

Plaintiff should be given an opportunity to prove his Eighth Amendment claim at trial. See *Santiago*, 435 F. Supp. at 149 ("[o]nly after a factual hearing, will we be able to determine whether or to what extent the conditions at [the youth detention facility] violate the eighth amendment").

VI. INJUNCTIVE RELIEF HAS REPEATEDLY BEEN GRANTED TO DESEGREGATE PRISON FACILITIES, AND SUCH RELIEF IS APPROPRIATE HERE TO PREVENT A CONTINUED VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS

Defendants' assertion that they should not be subjected to injunctive relief is without merit. In *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979), inmates of the Ohio state prison system moved for a preliminary injunction to stop the defendants from assigning new inmates to double cells on the basis of race. As is the case here, the defendant prison administrators admitted to a policy of segregating new inmates by race as a means to "reduce the possibility of racial tension and potential violence which it fears will result from celling black and white inmates together." *Id.* at 1187. The defendants in *Stewart* claimed that such a policy was necessary because they lacked sufficient information about new inmates to risk having racial bias flare into violence. *Id.* at 1187-88. Based on strikingly similar facts and contentions, the court noted that the defendants made no showing whatsoever to support their stated fears about violence:

> Indeed, because integration has not even been attempted at CCF with regard to reception inmates

within at least the past ten years, prison officials could not have had any experience with the effects of integration on which to base their apprehensions.

Upon questioning at the hearing, McKeen admitted that he had not relied on any documented support for the theory that racial segregation reduced tension among inmates. In essence, he acknowledged, the practice is based on his "common sense" attitude toward overall relations between the races.

> In the Court's view, however, an equally "common sense" attitude, and one supported by expert testimony at trial, would indicate that segregation of inmates rather than their integration tends to create racial misunderstandings and tensions.

Id. at 1188 (footnote omitted).[5]

Based on the above findings, the *Stewart* court held that the practice of segregating prisoners by race had not been justified by the defendants, and that the defendants would not be permitted to shield their otherwise unconstitutional actions behind the same "prison security and discipline"

5. The omitted footnote refers to testimony of Dr. David Fogel, a professor of criminal justice at the University of Illinois and consultant on corrections practices, who testified that "segregation did nothing to lessen racial tension or violence, and that integration would do more to lessen these tensions than segregation could."

exception that the CDC Defendants in the case at bar also seek to rely on:

> There is no evidence in this case that the practice at CCF arose out of any extreme or exigent circumstance involving racial conflict. Indeed, it does not appear that there could be any such evidence since blacks and whites have not been integrated in prison reception housing for at least ten years. A vague fear on the part of prison officials that segregation may result in violence is simply not enough to justify suspension of the fundamental constitutional right here at issue.

Id. at 1189.

In deciding that injunctive relief was appropriate, the *Stewart* court examined and the plaintiffs prevailed on the following determinations: (1) whether plaintiff has shown a strong or substantial likelihood, or probability of success on the merits; (2) whether plaintiff has shown irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; (4) whether the public interest would be served by issuing a preliminary injunction. *Id.* at 1193. The *Stewart* court held:

> Upon consideration of the facts of this case it is eminently clear that injunctive relief is warranted under the above criteria. The Court finds that there is a substantial likelihood that plaintiffs will succeed on the merits of their claim, and that plaintiffs have shown clear violations of

> constitutional rights amounting to irreparable harm. Further, having considered and rejected defendants' claims that the challenged measures are necessary for institutional security, the Court cannot find that injunctive relief would cause substantial harm to others. Finally, it cannot be doubted that the cessation of these practices will well serve the public interest. Accordingly, plaintiffs' motion for preliminary injunction will be GRANTED.

Id. at 1194. The *Stewart* court ordered the defendants to cease the practice of segregating cells within ten days from the date of the order, and prohibited any race-based assignments absent a statement in writing from the superintendent stating that the inmate in question should not be housed in an integrated cell, with such finding to be made a part of the inmate's prison record. *Id.* The court made clear that it was not requiring that all cells be integrated, but rather that race not be used as a factor in cell assignment. *Id.* at n.10.

Similarly in *Sockwell*, 20 F.3d 187, the court held that the segregation of double cells at Angola prison was unconstitutional. In 1975, a court order had been issued enjoining racial discrimination at Angola and ordering prison officials to immediately correct any effects of past racial discrimination. *Id.* at 189. This order, which was not complied with until 1990 when the prisoners filed the *Sockwell* lawsuit (*id.* at 190), followed a prior ruling of the Fifth Circuit which had approved the district court's granting of injunctive relief. *Williams v. Edwards*, 547 F.2d 1206, 1212 (5th Cir. 1977) ("[h]aving affirmed the District Judge's finding of

> unconstitutionality of the conditions at Angola we recognize his authority to order relief 'coterminous with the scope of the constitutional violation found to exist.'").

In one of the earliest prison desegregation cases, *Washington v. Lee*, the court imposed a strict duty upon the defendants to "cease the practice of arbitrarily segregating the races in the state, county and city penal facilities." 263 F. Supp. at 332-33. The court issued a decree mandating that defendants "take the necessary and appropriate steps to effect complete desegregation" of the penal facilities. *Id.*

Defendants admit that they have had no experience with integrating double cells for "at least" 24 years. See Hilger Decl. Ex. D, Cambra Depo. at pp. 32:19, 33:5, and Hilger Decl. Ex. C, Schulteis Depo. at p. 22:10-16. In light of these admissions and based on Defendants' admitted constitutional violation, this court has more than a sufficient basis under the above cited cases to find that injunctive relief is appropriate in these circumstances.

VII. BECAUSE THE PROHIBITION AGAINST RACIAL SEGREGATION IS SUCH A CLEARLY ESTABLISHED RIGHT, DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Law enforcement officers, including prison guards, do not have qualified immunity from civil damage suits if their conduct violates a clearly established statutory or constitutional right of which a reasonable person would have known. *Schwenk v. Hartford*, 204 F.3d 1187, 1195-1196 (9th Cir.2000) (citing to *Harlow v. Fitzgerald*, 457 U.S. 800,

818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Under this standard, summary judgment based upon qualified immunity is improper if, under the undisputed facts, and in light of the established law, a reasonable officer could not have believed his conduct was lawful. *Schwenk*, 204 F.3d at 1196.

Deciding whether an official is entitled to qualified immunity requires a two step analysis: (1) whether the law governing the officials conduct is clearly established; and (2) could a reasonable official have believed the conduct did not violate an identifiable right. *Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir.), *cert. denied* 522 U.S. 852 (1997) (citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir.1993)).

Here, Defendants' qualified immunity defense is easily disposed of based on directly applicable precedent. *Sockwell*, 20 F.3d at 192; *Simpson v. Horn*, 25 F. Supp. 2d 563, 574 (E.D. Pa. 1998). In *Sockwell*, the Fifth Circuit held that defendants in that case were not entitled to qualified immunity "due to their knowing and intentional participation in a general policy of racial segregation" with regard to double cells at a correctional facility. *Sockwell*, 20 F.3d at 152. In *Simpson*, the court similarly denied a motion for judgment based on qualified immunity, concluding that "the prohibition on racial segregation in cell assignments is a clearly established right of which a reasonable prison official would be aware." *Simpson*, 25 F. Supp. 2d at 574. The *Simpson* court cited to both *Sockwell* and *Lee v. Washington*, 390 U.S. at 333-34, in finding that the right of a prisoner to be free from racial segregation is clearly established. Tellingly, Defendants offer no cases indicating that the prohibition against racially segregated prison cells is anything other than a clearly established right.

Because protection from racial segregation is a clearly established right, Plaintiff respectfully submits that this court should find that a reasonable prison official ought to know that racial segregation violates a constitutional right, and the court should therefore deny Defendants' motion for summary judgment based on the defense of qualified immunity.

VIII. CONCLUSION

The undisputed evidence establishes that, without adequate justification, the California Department of Corrections segregates inmates by race or ethnicity when they are assigned to housing upon arrival at CDC-controlled institutions, and that the defendant prison administrators have engaged in a conspiracy to act in furtherance of that patently unlawful policy. Plaintiff respectfully request that this court reaffirm the well-established principle that forced racial segregation is unconstitutional, even in prisons, and accordingly deny Defendants' Motion for Summary Judgment in its entirety.

DATED: April 23, 2001

Respectfully submitted,

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APPENDIX N — DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED APRIL 27, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

Case No.: CV-95-01192 CBM

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

Honorable Consuelo B. Marshall

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Appendix N

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[Tables of Contents and Authorities Intentionally Omitted]

Defendants submit the following in reply to Plaintiff s opposition to Defendants' motion for summary judgment.

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I.

SUMMARY JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Avila v. Traveler's Insurance Co.*, 651 F.2d 658, 660 (9th Cir. 1981).

In this case, Plaintiff has opposed Defendants' motion for summary judgment. The Plaintiff opposing summary judgment has the burden of showing that a genuine dispute on a material issue of fact exists. *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir.1993). "There must be sufficient evidence for a jury to return a verdict in favor of the non-moving party; if the evidence is merely colorable or not significantly probative, summary judgment should be granted." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994). The nonmoving party "may not rest upon the mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue" of material fact as to each issue upon which he or she would bear the ultimate burden of proof at trial. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 256 (1986); *see also Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177-78 (2d Cir.1990). Summary judgment in favor of the moving party is therefore appropriate if the opposing party fails: (1) to produce evidence to support the existence of all essential elements on which the opposing party bears the

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burden of proof; and (2) to show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita v. Zenith Radio*, 475 U.S. 574, 585-87 (1986). In this case, Plaintiff has fails to meet his burden and summary judgment should be granted in favor of Defendants Gomez, Rowland, and Cambra and against Plaintiff.

II.

PLAINTIFF HAS NOT DEMONSTRATED STANDING TO BRING THIS CLAIM FOR EITHER DAMAGES OR INJUNCTIVE RELIEF

Before a Federal Court can consider the merits of a legal claim, the person seeking to invoke the court's jurisdiction must establish the requisite standing to sue. To do so, he must prove the existence of an Article III case or controversy by clearly demonstrating that he has suffered an "injury in fact," which is concrete in both a qualitative and temporal sense. He must show that the injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision." *See Whitmore v. Arkansas*, 495 U.S. 149, 149, 110 S. Ct. 1717, 1722-1723 (1990); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976).

In this case, Plaintiff objects to the initial classification of prisoners conducted when they first arrive at the prison.

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Plaintiff seeks damages against the former Directors of the California Department of Corrections (the "CDC") (Gomez and Rowland) as well as injunctive relief against the current CDC Director (Mr. Cambra.). Plaintiff does not demonstrate standing to sue. Plaintiff entered prison at the California Institution for Men in Chino, California on June 22, 1987. (Exh. 2 to Defendants' MSJ.) Plaintiff's classification summary was completed on July 20, 1987 (28 days later.) (See Exh. 3 to Defs' MSJ.) Plaintiff complains, without evidence, that race was the sole consideration in his initial housing decision. Plaintiff states, that the practice of prison officials, in even considering race in the initial housing decision, amounted to discrimination and violated his constitutional rights. Plaintiff, however, does not make this claim until filing this lawsuit in 1995, some eight years later. Because of his sentence, Plaintiff has no reasonable likelihood of going back through the classification system at the California Institution for Men or any institution again. No other inmate has joined plaintiff in this suit, and this is not brought as a class action lawsuit.

As to his present status, Plaintiff arrived at the California State Prison in Lancaster and has been housed there for some time. Plaintiff has no dispute with the prison's compatibility policy for those inmates who have permanent housing, such as Plaintiff. Moreover, Plaintiff has never asked to cell with an inmate of another race and it has never been denied[1].

1. Defendants believe this is important, in that under current law and, as applicable to the current Director of Corrections, Plaintiff must exhaust his administrative remedies before bringing an action for injunctive relief pursuant to 42 U.S.C. section 1997(e).

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In light of the evidence and the testimony being presented by the Defendants in this case, Plaintiff's demand for personal damages and injunctive relief are confusing in that he is not referring to a policy or practice being applied to him.

"It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). This case further holds that, "it is not the role of courts, but that of political branches, to shape institutions of government in such fashion as to comply with the laws and the constitution." (Id.); *see also Rains v. Byrd*, 521 U.S. 811, 818 (1997) (standing requires a legally and judicially cognizable injury).

The Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient to confer jurisdiction on a federal court. *See Schlesinger v.* Reservists, 418 U.S. 208, 216-217 (1974); *United States v. Richardson*, 418 U.S. 166, 176-177 (1974). Plaintiff has suffered no legally cognizable injury from the prison practice at issue. He lacks standing to maintain this action, and cannot assert third-party rights. Summary judgment should be granted in favor of Defendants and against Plaintiff.

III.

PLAINTIFF HAS NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAW

To establish a violation of the Equal Protection Clause of the Fourteenth Amendment, a Plaintiff must show that a defendant intended to racially discriminate. *See village ofArlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976). Discriminatory purpose implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator of Massachuesetts v. Feeny*, 442 U.S. 256, 279 (1979). It implies that the decision-maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group. *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982). Once this showing is made, the Court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

Here, Plaintiff does not demonstrate that any Defendant intended to racially discriminate against him. While Plaintiff doesn't agree with all of the housing practices within the CDC, Plaintiff does not demonstrate that they are for the purpose of singling out a particular group for disparate treatment. Moreover, under the evidence in this case, there

is no indication that the housing practices of the CDC are not equally applied to all inmates. Because of this, the Court need not even reach the second prong of the Equal Protection test, that is: whether or not the policy or practice at issues violates a constitutional right.

Under the second prong, the Supreme Court has adopted a standard for reviewing constitutional rights in the prison context. *See Turner v. Safley*, 482 U.S. 78, 89, 107 (1987). *Turner* focuses on the reasonableness of the prison official's actions. The Court considers four factors to determine whether a prison policy is constitutional: (1) whether there is a valid, rational connection between the policy and the penological interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Id.*, 482 U.S. at 89-90.

In the instant, case, the initial period in a prison is a critical time for prison officials and inmates alike. Upon an inmate's arrival to a reception center, the CDC has only limited information about the inmate. (See MSJ, Exh. 4, ¶ 5.) A classification summary prepared starts to be undertaken to see what security needs can be established. Disabilities, enemies and gang affiliation are all examined during this period. (See Exh. 4, ¶ 6:4-6). Before these are known, there could be great risks to inmates if they were, for example, to be celled with a member of a rival gang. This classification period typically takes sixty days.

(MSJ Exh.4, ¶ 12.) After that, inmates are moved into more permanent housing and can utilize the period of time to find a compatible cellmate. *See id.*, § 15.

This does not amount to discrimination. To prevent rival gangs from being housed together is reasonable. While clearly not all White inmates are members of a White Supremacist or Aryan Brotherhood gang, they could be. Similarly, not all Black inmates are members of the Crips or Bloods, but they may be. Clearly, not all Hispanic inmates are members of the Southern Mexican gang or the Mexican Mafia, but there remains the possibility that they might be. If not identified, the danger is that members of rival gangs would be placed into the same cells and then the potential is that what occurred on the prison yard could occur in the prison cell.

Plaintiff contends that Defendants concerns are based only on speculation about inmates. This is far from the truth. Defendants have produced evidence supporting their opposition to Plaintiffs motion for summary adjudication of issues which raises the same claim. Plaintiff is a Level-IV inmate. In another Level-IV prison, Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. (See Decl.of Associate Warden O'Neill, attached as Exh. 1.) As background of this current lockdown, on June 1, 1998, a riot occurred on the Facility A yard involving 39 Northern

and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months. (Exh. 1, ¶ 4.)

In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity, as well as the likelihood that this violence would continue, resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions. (*Id.*, ¶ 5.) On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay. (*Id.*, ¶ 6.) On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this incident. (*Id.*, ¶ 7.) On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved. The inmates were placed on lockdown until April 14, 1999. (*Id.*, ¶ 8.) On August 31, 1999, a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates. (*Id.*, ¶ 9.) On September 9, 1999, a racial disturbance occurred on the Facility A yard involving 7 Black and 4 White inmates. (*Id.*, ¶ 10.) On September 27,1999, a riot occurred

on the Facility A yard involving 30 Black and 3 White inmates. (*Id.*, ¶ 11.)

A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates and, finally, with both groups together. This resulted in full programing for these groups on the Facility A yard. (*Id.*, ¶ 12.) A similar approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted. (*Id.*, ¶ 13.) On February 23, 2000, however, a riot took place on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with .223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals: The institution was placed on lockdown. (*Id.*, ¶ 14.)

On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number of

riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation. (*Id.*, ¶ 15.) On August 25, 2000 information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits. At the conclusion of the search, and upon review of the information, it was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of the stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay. (*Id.*, ¶ 16.) At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence. (*Id.*, ¶ 17.)

By comparison, there has been no evidence produced by Plaintiff that these problems could have been avoided by disregarding race in the initial cell assignments. As Mr. Cambra states, ". . . I feel it would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the

problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety." (Exh. 4 to MSJ, ¶ 14.)

Defendants have an additional duty under the Eighth Amendment to protect inmates from a known danger. In *Farmer v. Brennan,* 511 U.S. 825 (1994), the Supreme Court held that under the Eighth Amendment, prison officials have a duty to "provide humane conditions of confinement . . . [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates . . ." *Id.* at 831. In general, a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment. *Id.* at 827. Where the claim at issue is predicated upon the failure to protect, the deprivation is deemed to be sufficiently serious if there was a substantial risk that the prisoner would suffer serious harm. *See Id.* As the declarations of Mr. Cambra, Mr. O'Neill and Ms. Schulteis (MSJ Exh. 3) point out, they make their housing decisions with the paramount concern being safety. In the instant case, in the judgment of prison officials, they do not have adequate information about the inmate until he is classified. To ensure that they are not placing rival gang members together, there is a rational connection to not housing inmates with potential gangs rivals, and therefore Defendants act in a reasonable manner.

In *Simpson v. Horn,* 25 F. Supp. 2d 563 (E.D. Penn. 1998), the Court, addressing a Pennsylvania prison policy held that, ". . . defendants' written policy on classification of inmates for double-celling, which takes race into account as one of several compatibility factors, is permissible, and even possibly required, under the reasonableness standard of *Turner*. . ."*Id.* at 570.

Under the *Turner* analysis, the question for the Court is not whether this does in fact advance the government interest, only whether the Defendants might reasonably have thought that it would, When the inmate does not present enough evidence to refute a common-sense connection between a prison regulation and the [asserted] objective the presumed governmental objective is legitimate and neutral. *See Frost v. Symington,* 197 F.3d 348, 357 (9th Cir.1999). *Frost* further commands (although applied in a First Amendment case, it should be no less applicable in the Fourteenth Amendment case) that if plaintiff does not present sufficient evidence to refute a common-sense connection between the Department regulation and its stated objectives, "prison officials need not prove that the banned material actually caused problems in the past, or that the materials are 'likely' to cause problems in the future." *Id.* at 354. The Court went on to state,

> . . . [I]t "does not matter whether we agree with" the defendants or whether the policy "in fact advances" the jail's legitimate interests. [citation] The only question that we must answer is whether the defendants' judgment was "rational," that is, whether the defendants might reasonably have thought that the policy would advance its interests.

> [citation] This language holds that even in the absence of institution-specific or general social science evidence, as long as it is plausible that prison officials believed the policy would further a legitimate objective, the governmental defendant should prevail on *Turner 's* first prong.

Id. at 355, citing *Mauro v. Arpaio, 188* F.3d 1054, 1060 (9th Cir. 1999).

Although Plaintiff repeatedly refers to the Ohio cases regarding double-celling of inmates without consideration of race (*See, e.g., Stewart v. Rhodes,* 473 F.Supp. 1185 (S.D. Ohio 1979), Plaintiffs fail to address the disturbing and unfortunate aftermath, leading the Ohio Court to reluctantly modify the Consent decree.

> On April 11, 1993, the worst prison riot in Ohio history, and one of the worst in United States history, erupted at the Southern Ohio Correctional Facility ("SOCF"). Nine inmates and one corrections officer were murdered and many others were injured during the eleven day standoff. During negotiations as well as after the riot, prisoners repeatedly cited integrated celling as a factor contributing to the tense atmosphere at SOCF. Among the demands the prisoners made as part of their agreement to end the siege, was that the Consent Decree in this case be reviewed. The siege finally ended on April 21, 1993.

White v. Morris, 832 F.Supp. 1129, 1130 (S.D. Ohio, Western Div., 1993).

In this case, there is no evidence of a violation of Plaintiff's equal protection rights under the Fourteenth Amendment. Summary judgment should be granted in favor of the Defendants on Plaintiff's Fourteenth Amendment claim.

IV.

PLAINTIFF HAS FAILED TO DEMONSTRATE A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS BY DEFENDANTS

Plaintiff has failed to demonstrate a violation of his Eighth Amendment rights. An institution's obligation under the Eighth Amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir.1982). In *Vazquez v. Carver,* 1987 WL 14847 *19 (E.D.Pa.), the court found that the consideration of race in classification of inmates is not cruel and unusual punishment. Summary judgment should be granted in favor of defendants and against Plaintiff on Plaintiff's claims of an Eighth Amendment violation by Defendants.

V.

THERE IS NO EVIDENCE OF A CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff alleges that Defendants conspired against him. 42 U.S.C § 1985 prohibits individuals from entering into a conspiracy to deprive an individual of his civil rights. To prevail on a § 1985(3) claim, a plaintiff must prove that the defendants: (1) engaged in a conspiracy; (2) for the purpose of depriving him or her of equal protection, or equal privileges and immunities under the law; (3) acted in furtherance of the conspiracy; (4) deprived the plaintiff of the exercise of any right or privilege of a citizen of the United States; and (5) were motivated by discriminatory animus. *See New York State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1358 (2d Cir.1989), *cert.denied,* 495 U.S. 947 (1990). Under the clauses of section 1985, an allegation of racial or class-based animus is an essential element of the claim. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir.1987). To establish such animus, a plaintiff must show an "invidiously discriminatory motivation . . . behind the conspirators' action." (*Id.*, at 561) Under *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121 (9th Cir.1989), Plaintiff would have to show both an agreement or meeting of the minds among the defendants to violate his constitutional rights and that the conspiracy actually deprived him of his constitutional rights. *Id.*, at 1126.

Here, Plaintiff states that a conspiracy existed but failed to allege facts that would show that the defendants, motivated

by animus, conspired to deprive him of a substantive right. *See Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir.1997).

Summary judgment should be granted in favor of Defendants on Plaintiffs claim of conspiracy.

VI.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Prison officials, performing discretionary functions within the limits of their duties, receive a qualified immunity from damages in Civil Rights actions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette,* 434 U.S. 555, 561-562 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819 (1982). The purpose of this rule is to permit such officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Id.* at 819; *Kraus v. County of Pierce,* 793 F.2d 1105, 1108 (9th Cir. 1986). "As the qualified immunity defense has evolved, it provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). An official is denied qualified immunity only if the law was clearly established and a reasonable official could not have believed that his conduct was lawful. *Somers v. Thurman,* 109 F.3d 614, 617 (9th Cir. 1997).

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Thus, in deciding whether an official is entitled to qualified immunity, the court must inquire: (1) whether the law governing the officials' conduct was clearly established at the time of the alleged violation; and (2) under the law, whether a reasonable official could have believed the conduct did not violate an identifiable right. *See Act Up!/Portland v. Bagley,* 988 F.2d 868, 871-72 (9th Cir.1993). The inquiry focuses on whether a reasonable official in the position of any of the defendants could have believed that his conduct in question was lawful. *See id.* at 872. Additionally, the Ninth Circuit has stated that,

> The question of whether a reasonable [official] could have believed [that his conduct was lawful] is 'an essentially legal question' . . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.

See id, at 873 (citation omitted).

In this case, there was no violation of a clearly established law. Moreover, Defendants could have reasonably believed that their conduct was lawful under the established legal principles. First, under *Lee v. Washington,* 390 U.S. 333, 334 (1968) prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Second, Defendants could have reasonably believed that considering race as a factor, among others, when placing inmates into a cell where they are able

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to classify them and ensure there are no rival gang issues at stake is lawful under the established law. It is not the job of the court to determine whether the Defendants' conduct actually violated clearly established statutory or constitutional rights, but rather to decide whether the Defendants could have reasonably believed that their actions were reasonably related to prison security. *See Manhattan Beach Police Officers Ass'n, Inc. v. City of Manhattan Beach, 881* F.2d 816, 818 (9th Cir.1989). Thus, Defendants are entitled to qualified immunity. *See Act Up!/Portland,* 988 F.2d at 871-72.

CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Defendants Rowland, Gomez and Cambra and against Plaintiff.

DATED: April 27, 2001

Respectfully submitted,

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Attorney General

DAVID DRULINER
Chief Assistant Attorney General

PAUL GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Sara Turner
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

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EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DECLARATION OF PELICAN BAY STATE PRISON ASSOCIATE WARDEN B. O'NEILL

I, B. O'NEILL, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 21 years. Presently, I am an Associate Warden at Pelican Bay State Prison ("Pelican Bay").

2. One of my duties involves overseeing the "general population" yards at Pelican Bay. The general populations yards include the Facility A and B yards, which house several thousand level-IV inmates.

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3. Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related, conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. At the request of the Office of the Attorney General, and in preparation for this declaration, I reviewed my synopsis of the history of his lockdown that I previously prepared as briefing for the Warden.

4. As background, On June 1, 1998, a riot occurred on the Facility A yard which involved 39 Northern and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months.

5. In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity as well as the likelihood that this violence would continue resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions.

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6. On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay.

7. On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this.

8. On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved in this. The inmates were placed on lockdown until April 14, 1999.

9. On August 31, 1999, a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates.

10. On September 9, 1999, a racial disturbance occurred n the Facility A yard involving 7 Black and 4 White inmates.

11. On September 27,1999, a riot occurred on the Facility A yard involving 30 Black and 3 White inmates.

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12. A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates, and finally with both groups together. This resulted in full programing for these groups on the Facility A yard.

13. A similar approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted.

14. On February 23, 2000, there was a riot on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with .223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals. The institution was placed on lockdown.

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15. On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number or riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation.

16. On August 25, 2000, information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits. At the conclusion of the search, and upon review of the information, It was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay.

17. At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of April, 2001, at Crescent City, California.

s/ Barry O'Neill
BARRY O'NEILL, ASSOCIATE WARDEN
PELIGAN BAY STATE PRISON

APPENDIX O — REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES DATED AND FILED APRIL 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Hon. Consuelo B. Marshall

Date: May 7, 2001

[Subject to Application to Reinstate]

Time: 10:00 a.m.
Courtroom: 2

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[Filed Concurrently with Plaintiff's Evidentiary Objections to Declarations Submitted in Opposition to Plaintiff's Motion for Summary Adjudication of Issues]

I. INTRODUCTION

In their Opposition, as they did in discovery, Defendants **admit** that they assign prison inmates to double cells based on the race and ethnicity of those prisoners.[1] They also acknowledge, as they must, that "segregation of the races in prisons and jails violates the Equal Protection Clause of the Fourteenth Amendment." Defendants' Opposition to Plaintiff's Motion for Summary Adjudication of Issues ("Opp.") at p. 2, ll. 18-19. They nonetheless seek to avoid entry of summary judgment for Plaintiff on his cause of action for violation of the Fourteenth Amendment by arguing that the segregation they knowingly impose system-wide in California State Prisons "'is reasonably related to [the] legitimate penological interest'[ ]" of reducing violence. Opp. at p. 2, ll. 27-28, quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). However, they ignore the specific directive of the

1. In his declaration submitted in support of the opposition, Acting Director of Corrections Steven Cambra says: ". . . race is considered during the initial double-cell housing classification decision." (Declaration of S. Cambra in Support of Defendants' Motion for Summary Judgment ["Cambra Dec."], attached to the Opposition as Exhibit 2, at ¶ 8, p. 3.) The Associate Warden of the California State Prison at Lancaster, where plaintiff resides, expressly states: "If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of the same ethnic race." (Declaration of L. Schulteis in Support of Defendants' Motion for Summary Judgment ["Schulteis Dec."], attached to the Opposition as Exhibit 3, at ¶ 5, p. 2.)

Supreme Court in *Lee v. Washington*, 390 U.S. 333, 334 1968), which, ironically, they cite[2] but fail to address, that prison authorities may take account of race when dealing with potential violence only **in particularized circumstances**, contending, instead, that they must **always** assume that all members of different races and ethnic groups will do each other violence if housed together.

In large part Defendants simply repeat the insufficient presentation they made in support of their own motion for summary judgment. (So as not to burden the Court with additional paper, Plaintiff therefore incorporates herein by reference his opposition to that motion.)[3] Perhaps recognizing the total absence of a showing sufficient to overcome the Supreme Court's holding in *Lee* that "a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation" (*Sockwell v. Phelps*, 20 F.2d 187, 191 (1994); *see, also, United States v. Wyandotte Co., Texas*, 480 F.2d 969, 971 (10th Cir. 1993)), Defendants submit and discuss at great length a declaration by the Associate Warden at Pelican Bay State Prison concerning "racially-based, gang-related, conflicts that have erupted into riots and acts of violence **on the prison yards**" at Pelican Bay State Prison. Declaration of Pelican Bay State Prison

2. *See, e.g.*, Opp. at p., 2, ll. 19-22 and p. 12, ll. 10-11.

3. That opposition consists of: Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment; Motion to Strike Based on Evidentiary Objections; and Response to Statement of Uncontroverted Fact and Statement of Genuine Issues, collectively referred to below as "Opp. to CDC Motion."

Associate Warden B. O'Neill at ¶ 3, p. 2; emphasis added. That declaration provides a great deal of information about Pelican Bay, including the presence of many weapons among the inmates. However, *nothing* in that declaration has anything to do with system-wide cell housing decisions based on race, the only issue in this case.[4] Perhaps the greatest significance of the Pelican Bay declaration is its silence on that issue. That silence underscores Defendants' utter failure to proffer evidence of **particularized circumstance** to support their imposition of a system-wide practice of assigning prisoners to cells that are segregated on the basis of race and ethnicity. Plaintiff therefore is entitled to entry of judgment on his second and third claims for relief.

II. ARGUMENT

In their Opposition, Defendants assert that Plaintiff has failed to establish that they have violated his Constitutional Rights. Significantly, however, they have failed to dispute a single fact that Plaintiff presented to this Court in his Statement of Uncontroverted Facts -- all of which should now be accepted by the Court pursuant to Local Rule 7.14.3 -- and they ignore the Ninth Circuit's opinion in this very case. That opinion, reported at 207 F.3d 650 -- a copy of which also is attached to the moving papers as Exhibit A -- implicitly rejects the suggestion in Defendants' Opposition that Plaintiff lacks standing to assert the Constitutional

4. Plaintiff has objected to the entire declaration on grounds of relevance. Discussion of the declaration is without prejudice to that and other asserted evidentiary objections.

challenges set forth in his complaint[5] and explicitly holds that if established -- and, as demonstrated in Plaintiff's moving papers, they have been -- those allegations make out claims for violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1985(3). 207 F.3d at 655.

Defendants' effort to justify their system-wide practice of segregating inmates in two-person cells based on race and ethnicity by invoking the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78, is unavailing -- as Plaintiff demonstrated in his Opp. to CDC Motion at 9-11. In fact, as noted by the District Court in *Simpson v. Horn*, 25 F. Supp. 563, 572 (E.D. Pa. 1998), virtually every one of the rationales invoked by Defendants here was cited by the defendants in *Sockwell* -- and rejected because it failed to meet the particularized need test of *Lee*.

Nor does the O'Neill Dec. change the equation. Warden O'Neill's duties include overseeing the "general population" yards at Pelican Bay. (O'Neill Dec. ¶ 2, p. 1.) Nothing in his declaration covers his role, if any, in making cell housing decisions. His five-page declaration indicates that there have been numerous racial riots at Pelican Bay prison. The declaration also discusses some of the reasons that Warden O'Neill believes the riots occurred and focuses on the presence of weapons and other contraband among the inmates at that facility. None of this has anything to do with inmates of one race being housed with inmates of a different race -- the issue in this case.

5. For a full discussion of Plaintiff s standing see Plaintiff's Opp. to CDC Motion at pp. 3-5.

Plaintiff agrees with Defendants that racial riots do occur at CDC facilities. However, while Defendants contend that inmates are fundamentally and perhaps innately full of racial animus, Plaintiff Johnson believes that the system of racial segregation itself, instituted and enforced by the CDC, is a fundamental cause of the racial tensions leading to the sort of racial riots illustrated by the O'Neill Dec.

But for the purposes of *this* motion, Warden O'Neill's reports of riots at Pelican Bay and why he thinks they occurred are totally irrelevant[6] except and only to the extent that his declaration underscores the degree to which Defendants are impermissibly using generalized fears of violence based on their experience at one facility to attempt to justify a policy and practice of cell segregation **throughout the entire California prison system.**

Plaintiff already has addressed each of Defendants' other arguments in his opposition to their summary judgment motion. He therefore respectfully directs the Court's attention to those portions of the Opp. to CDC Motion that demonstrate that (1) by acting to further an agreed upon policy of using race-based assumptions in cell placement, Defendants have demonstrated a conspiracy under 42 U.S.C. § 1985(3) to deny Plaintiff his Constitutional Rights (Opp. to CDC Motion at pp. 13-14); (2) injunctive relief has repeatedly been granted to desegregate prison facilities, and such relief is appropriate here (*id.* at pp. 16-19); and (3) because the prohibition against racial segregation is such a clearly established right, defendants are not entitled to qualified immunity (*id.* at 19-20).

6. In this regard, Plaintiff respectfully reminds the Court that he is not even a resident of Pelican Bay. Rather, he is an inmate at the Lancaster State Prison.

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III. CONCLUSION

Plaintiff's Motion for Summary Adjudication of Issues asks this Court to determine two things: (1) that CDC's race-based system-wide housing placement practice is violative of his rights under the Fourteenth Amendment, and (2) that the practice, as implemented by all CDC directors, wardens and employees is evidence of a conspiracy to violate his Constitutional rights. For the reasons set forth in the moving papers and above, Plaintiff is entitled to judgment on these issues.

Because there are issues of fact regarding the extent of the physical, mental, and emotional damage suffered by Plaintiff, those issues cannot be addressed by the Court at this time. Rather, they should be examined at a trial on damages and on Plaintiff's remaining claim for relief following this Court's entry of an order holding that the CDC is liable on the second and third causes of action.

DATED: April 30, 2001

Respectfully submitted,

PROSKAUER ROSE LLP
BERT H. DEIXLER

and

JEFF GARCIA HILGER

By: s/ Lois D. Thompson
LOIS D. THOMPSON
Attorneys for Plaintiff
GARRISON JOHNSON

APPENDIX P — HEARING TRANSCRIPT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED JUNE 11, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES, CALIFORNIA

Case No. CV-95-1192-CBM
(BQRx)

Los Angeles, California
June 11, 2001
10:50 a.m.

GARRISON S. JOHNSON

Plaintiff

vs.

STATE OF CALIFORNIA

Defendant

PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE HONORABLE HARRY L. HUPP, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

Appendix P

APPEARANCES:

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ALSO PRESENT: KATHERINE CHANG,
Harvard Law Student

PROCEEDINGS BEGIN AT 10:50 A.M.

(Court is Called to order)

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THE CLERK: Item Number 2, CV-95-1192 CBM, Garrison S. Johnson versus State of California, counsel please state your appearances.

MR. DEIXLER: Good morning, Your Honor. Bert Deixler and Jeff Hilger on behalf of Mr. Johnson. And with the Court's permission --

THE COURT: What was that second name?

MR. DEIXLER: Mr. Hilger. H-I-L-G-E-R, the Mr. Hilger is going to make his maiden argument in a federal court this morning. With the Court's permission we have a summer associate from our firm Katherine Chang of the Harvard Law School and I would request her permission to sit at counsel table as well.

THE COURT: Of course.

MR. DEIXLER: Very well, Your Honor.

THE COURT: And Ms. Turner.

MS. TURNER: Good morning, Your Honor. Sarah Turner, Deputy Attorney General on behalf of the defendants.

THE COURT: Well you've got an interesting case, I read the 9th Circuit opinion which reversed Judge Wardlaw on the motion to dismiss. And they said get somebody who knows what they're doing to work on it for the plaintiff and they [4] did. And the Court appreciates the work that plaintiff's counsel has done in straightening out what must have been a

fairly confusing mess to start with. And it is presented in rather clear fashion.

As you can see I didn't think there was anything to the 8th Amendment claim. There's the type of injury which is claimed is really not the type of injury that the 8th Amendment thinks about. So we're really talking about equal protection. And as a matter of fact the principal cases involved use the equal protection clause, the *Lee* case and the *Turner* case and most of the others, the one in the 5th Circuit and the one I think it was the 8th Circuit, the other circuit that you cited.

They talk about equal protection and as you can see I ended up thinking that there is an issue of fact on equal protection. I didn't see anything to tot he conspiracy. The Department of Corrections has followed the same policy through three administrations. But it didn't seem to me that that was an indication that the three directors of the department were conspiring with each other. They were maintaining the same policy obviously, which I didn't think was conspiracy, so.

My tentative got rid of the conspiracy claim and the equal protection claim, but found a triable issue of fact under the equal protection claim. And let me, Mr. Hilger, me let you start on that and then I'll call on Ms. Turner to [5] talk about whether there is anything left of equal protection here.

MR. HILGER: Okay, Your Honor, I'd like to briefly address the conspiracy and 8th Amendment points and then also get into a little bit of the equal protection because I do

believe that there is no triable issue of fact on that question. But I'll save that for the end.

THE COURT: Yes.

MR. HILGER: Regarding the conspiracy there is -- we're not claiming conspiracy among the three different directors. We're claiming a conspiracy within the Department of Corrections. And there's one crucial piece of evidence that is presented in the record and that is that there is clearly an agreement from the top to the bottom to enforce this policy of segregation. And that, it's been articulated at the top by CDC director, Steven Cambra who says, yes we have this policy. And everybody down the line follows this policy.

If we accept for the sake --

THE COURT: Is that a conspiracy?

MR. HILGER: We believe so, cause if we accept for the sake of argument that this policy is illegal and they're agreeing to do something that is --

THE COURT: Anytime you have a government policy every government employee who follows a policy is a conspirator?

[6] MR. HILGER: If the policy is clearly, as we believe this policy is, illegal. They are agreeing to look at a person and because of the color of their skin house them in a certain place. That policy has been fifty years ago, *Brown versus Board of Education* has been eliminated from our government.

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THE COURT: Slow down now. You're statutory vehicle was Section 1983 and under all of these claims of course. There's no such thing as responding at superior responsibility under 1983. You could sue the individual who does the unconstitutional act under Section 1983, you can't sue the policeman unless he uses excessive force on somebody, you can't sue the sargent and the lieutenant and the captain under responding superior. It's just no claim.

Now you're individual defendants who are the respective directors, two former directors and the present director of the Department of Corrections and your facts appear to be that the same policy was used by the Department of Corrections though all three administrations. To my mind that doesn't amount to a conspiracy even though you may have under leads exercising the policy, you're going to have to sue the particular under lead if you want to bother, which isn't worth your while frankly. But, and not sue the director for conspiring to have this policy. It's just not a conspiracy.

You know a civil conspiracy is merely a way of [7] broadening the scope of people who are liable. And you find it -- you find under 1983 these conspiracy cases are people who joined in the direct commission of an unconstitutional act. The three officers out on the beat who join in whaling away with the baton on the victim by pre-agreement between them that they are going to whale away with the baton on the victim just doesn't fit here.

MR. HILGER: Well, although this case is less visible dramatic we believe that the violation is just as clear. I mean not only has every court from every other district that's looked

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at this question come out the same way, it is a clearly volatile policy and if those --

THE COURT: Wait a minute, what's the point in having a conspiracy claim if the three directors are not conspiring with each other?

MR. HILGER: By -- we believe that the fact that they are conspiring down to their subordinates, if I'm that person at the bottom and I know that that policy is wrong, we believe that that subordinate has a duty to inform their superiors that this is wrong and by conspiring, by agreeing to enforce a policy that we think is clearly to any reasonable observer wrong that there is that element of conspiracy.

THE COURT: What's the point in having a conspiracy allegation if you're not going to join other people in it?

MR. HILGER: We feel that it was a violation so [8] that's the reason for the inclusion, we feel that --

THE COURT: Okay, let's talk about the 8th Amendment.

MR. HILGER: Yes, Your Honor.

THE COURT: Cruel and unusual punishment is usually used in situations where somebody is left to suffer physically --

MR. HILGER: Right.

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THE COURT: -- in prison there's a line of cases that failed to provide medical attention for example, where reasonably unnecessary, can be cruel and unusual punishment. I suppose if somebody thought to install, hang the prisoners from, like they did in the mediaeval times in the dungeon from their wrists with their feet shackled to shackles, would be cruel and unusual punishment.

That seems to me to the be the type of meaning that is implied by the people who wrote the 8th Amendment. Rather than the type that your attributing to in this claim.

MR. HILGER: In this case we were clearly requesting the Court to give an opportunity for us to show that there is a triable issue of fact. We believe and Mr. Johnson claims he has suffered the kind of emotional, psychological damage that past Courts have found segregation caused among school children --

THE COURT: Yes, what --

MR. HILGER: -- this is that sort of psychological damage.

THE COURT: Yes, but where's the evidence of that? This is a motion for summary judgment.

MR. HILGER: Again, this is the kind of thing that we knew was a triable issue of fact, we didn't focus on, we didn't make an affirmative motion for summary judgment on this claim.

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THE COURT: I understand.

MR. HILGER: We believe that we can --

THE COURT: Yes, we're talking about the defendant's motion for summary judgment on the 8th Amendrnent here.

MR. HILGER: In --

THE COURT: I understand that you only move for summary judgment on the equal protection and conspiracy claims.

MR. HILGER: We believe that just based on Mr. Johnson's claims and based on his deposition testimony that he has suffered psychological damage, he testified to that at deposition. We believe it's a triable issue of fact. If this case is going to go to trial, we believe it should be part of the evidence at trial.

THE COURT: Say, in his deposition didn't he say he's as happy as a clam with his roommates?

MR. HILGER: With his -- some roommates at some [10] times, but not consistently happy. If he was consistently happy with his cell mates he would have never filed this claim. Also, Your Honor, he did state at deposition he didn't think it was possible for him to have anyone other than a black cell mate. I've talked with Mr. Johnson, he's expressed to me his belief, which I share, that by being put into a random system with others of different races that he would expand his mind, he would expand diversity, he would benefit from that and his inability to be able to do that has caused him harm.

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THE COURT: Is that cruel and unusual as opposed to a violation of his right to equal protection?

MR. HILGER: We believe that in addition to being in violation of his equal protection that it is cruel and unusual because he has no opportunity to grow in that way and he has no chance, Your Honor, of learning that sort of thing. And that he is suffering psychologically and emotionally because of that and would simply request the opportunity to prove that at the trial.

THE COURT: Okay. Now, let's talk about equal protection. My tentative has a denial both of your summary judgment motion and of the defendant's summary judgment motion on equal protection. That seems to me really -- that claim is at the heart of the case. What we're talking about is how -- whether the facts are so clear one way or the other the[11] summary judgment should be granted under the standards basically the *Lee* followed by the *Turner* case.

Lee says segregation of housing in prisons is unconstitutional and then it's got a qualifying sentence, prison authority is acting in good faith and in particularized circumstances may taken into account racial tensions in maintaining security, discipline and good order in prisons and jails. That was the qualification.

Turner came along and put more modern terminology in it, it said strict scrutiny doesn't apply. You look at it with a differential eye and you have four tests. And the four tests are stated in rather general terms, I've got to say. You're looking at a rational relationship between what the person is

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doing and what they call a governmental interest at stake. I assume they mean the security and safety of penalogical (sic) institutions in that. They're looking at whether there are alternatives and least restrictive alternatives and they're looking at something called the impact of recognizing the right on prison resources and guards. Or in other words, would your costs skyrocket if you had to do something else or make a danger for the guards.

And here's what the defendants have outlined. They say first at the initial receipt of the defendant at the inmate reception center down at Chino, there's another one in Northern California, and also when he's first received at a [12] new institution they do use race as a factor in double celling. They say we also use other factors, what we know about gang membership, what and whether both parties smoke or don't smoke, whether they're of comparable age and so on. But they come right out and say because of the prison gang factor, which are in effect self organized into racial groupings by and large, we have to initially for safety sake put the prisoner in with somebody of his own race.

Now I assume that doesn't they mean if they know that one is a Blood and one is a Crip they put them in the same cell. But otherwise they do it by race. And then they say after the initial analyzation factor and the -- while they do not describe in great detail in the declarations the various things they do down in the inmate reception center in Chino, they do quite an extensive review of testing of trying to -- of interviewing, of trying to get the history of the inmate and so on. And then they decide which institution the inmate goes to. Actually it could be Chino, they've got a prison section at Chino also.

More often it's another one of the prisons in the state, where again they do a compatibility study. If the prisoner, as I understand the facts which don't seem to be disputed, if the prisoner is of a security classification where he can go into a dormitory setting it's a desegregated dormitory setting. Where the prisoner is of a higher, [13] apparently of a higher risk and I gather Mr. Johnson fell in that category that putting him in double cells.

Now here's where you've got an issue of fact, Mr. Johnson says that so far as his observations have been and he's been in a whole broad selection of California prisons, he's never seen a double celling with an integrated setting. And he said he's never been offered such a thing. He also says, I've never asked. But whether that's here nor there that's part of the factual picture. The prison people say that a prisoner is entitled within limits to select his own cell mate and that they honor that selection wherever they can, which leads to the impression they're saying we routinely honor these things unless there's some special reason not to, at least that was the conclusion I drew.

MR. HILGER: May I address that briefly?

THE COURT: Yes, hang on just a minute, you're going to address the whole schmeir.

MR. HILGER: Okay.

THE COURT: I'm trying to state what I understand to be the facts that aren't disputed. There is a disputed fact situation as to whether integration is a realistic thing once

this original classification study at each institution and also at the inmate reception center, actually work to have an integrated prison system and that's I think, part of the issue of fact here that you're going to end up trying. The prison [14] people do not say that they have any what we would now call, which I guess at some places is now a dirty word, an affirmative action program to create a desegregation in double cell situation.

They do say it is open to the prison. Mr. Johnson says, nobody ever told me that and in fact in the entire time I've been in prison which is, well fifteen years, I've always had a black cell mate. It seems to me that first, if your standard is not strict scrutiny but, what's the phrase?

MR. HILGER: Valid rational connection.

THE COURT: Well, okay --

MR. HILGER: That was from *Turner.*

THE COURT: But a differential approach to the very serious problems that prison administrators have regarding the safety of prisoners and which you don't need an affidavit to tell you about them, you can read about them in the paper. Not only in the county jail, but in various state prisons. The prison authorities do have serious problems because of the frequent occurrence of gangs where the prisoners self select into racial groups, that they have to deal with this problem, you've got a question the fact of whether the way they're going about it with a differential treatment that the *Turner* case says that you look at, is within the meaning of

the equal protection clause. And that's where I found your issue of fact here.

[15] That's a long winded statement, I guess what I have in the tentative ruling which, from which I tried to determine how this case should go. Let me get your views on this.

MR. HILGER: Okay I'd like to first address -- I basically am hearing two questions of fact that Your Honor finds. The first is the question of whether or not he really does have a choice to move.

THE COURT: Yes.

MR. HILGER: To that I would -- and the second is whether doing something about this integration is really a possibility.

THE COURT: Yes. Well, there is a question with regard to the initial housing situation --

MR. HILGER: Right.

THE COURT: -- at the inmate reception center while their doing their testing and classification. And at each institution when the new prisoner arrives at that new institution they do admit that they tend to classify prisoners by race when on double summing, for this initial purpose of evaluation. Thereafter they say, it's open to the prisoners themselves whether they want to be integrated. Well, you've got a question as to whether that (A) under the *Lee* case that's good enough and (B) whether it's actually realistic in the real world --

[16] MR. HILGER: Right what we would contend is that it is not --

THE COURT: -- which is really where Mr. Johnson's testimony comes into effect --

MR. HILGER: Yes.

THE COURT: -- because he says nobody ever told me this and while my roommate, at least the cell mate now is compatible, I never knew that I had a choice, open choice of cell mates.

MR. HILGER: Right. What we would state is that that open choice doesn't happen, as Your Honor knows, until sixty days into the process. So the --

THE COURT: Well at inmate reception center that's a case. I don't think there are facts that show whether it was sixty days at the individual institutions like Folsom and --

MR. HILGER: The one --

THE COURT: -- Calipatria and so on --

MR. HILGER: The one fact that we do have, that we know, is that when a prisoner transfers as Mr. Johnson was transferred within the past two weeks to yet another institution --

THE COURT: Oh really?

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MR. HILGER: Yes.

THE COURT: Where is he now?

MR. HILGER: Lompoc, I believe.

[17] THE COURT: Oh my.

MS. TURNER: Lompoc --

THE COURT: It won't be Lompoc, that's a federal prison.

MS. TURNER: Tehachapi, I believe.

MR. HILGER: That doesn't sound right.

MS. TURNER: Corcoran

MR. HILGER: Corcoran.

THE COURT: Okay Corcoran.

MR. HILGER: When a prisoner is transferred there's one document that was testified to, the form CDC135 that accompanies him or her. That document lists three pieces of information with an optional extra line. The three required pieces of information are name or number, it's the same thing, custody level and ethnicity.

THE COURT: Yes.

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MR. HILGER: There's a blank space where gang affiliation can be included so if we know this prisoner is a gang member, then we know coming into the next facility that he should not be placed if he's a Crip, he should not be placed with any other Crips. What happened -- that happens with prisoners who are gang members.

THE COURT: Yes.

MR. HILGER: If he's not a gang member we're still looking at his race and that's what we contend is the [18] violation.

THE COURT: Yes, I understand.

MR. HILGER: And the only area where we believe that there are undisputed facts is with this initial placement policy. When he first arrives, ethnicity is looked at, the department agrees, the state agrees, there is not enough time to look at anything other than race. Which leads me into this sort of standard of scrutiny that I would like to address briefly also.

THE COURT: You know part of the most sever rivalry between gangs, at least in the past, maybe its died down now, used to be between two black gangs, Crips and Bloods --

MR. HILGER: So how does separating blacks --

THE COURT: I don't know how the prison tells the difference there --

MR. HILGER: Well --

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THE COURT: -- reading the declaration of Warden O'Neil from Pelican Bay, apparently there are also severe rivalries between types of Hispanic gangs, which is something new on me, I've never heard that one before, but apparently has caused some bloodshed up at Pelican Bay. And so --

MR. HILGER: Clearly, Your Honor --

THE COURT: -- this complicates the prison authorities problems I suppose --

MR. HILGER: I agree it's a huge part of their job [19] and obviously Your Honor, none of us here are experts in prison administration, but we are supposed to be at least, strive to be experts in reason. Let me just present this one thought.

THE COURT: Okay.

MR. HILGER: I believe that if a Crip -- if the goal is to keep separate members of gangs separated and we know that most rival gangs are of the same race, the Crips and the Bloods are black gangs.

THE COURT: Yes.

MR. HILGER: How does putting two blacks into the same cell, in any way help eliminate gang problems?

THE COURT: You know I was going to ask Ms. Turner this same question. I assume that if you have a known Crip and a know Blood you don't put them in the same cell.

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MR. HILGER: We believe and Mr. Johnson believes --

THE COURT: If they have a blue --

MR. HILGER: Sorry.

THE COURT: -- blue bandana and a red bandana you don't mix em up, is that the test --

MR. HILGER: And yet well they --

THE COURT: -- is that the sign?

MR. HILGER: -- they do make attempts to --

THE COURT: Whatever, hang on Ms. Turner, I'll give you plenty of chance on that one.

[20] MR. HILGER: What we believe is that the CDC is using race as a scapegoat to somehow connect it together with gangs. We agree that members of rival gangs should not be housed together. We agree that gang affiliation, gender, custody level are all completely valid. What we have a problem with is race. And on the summary judgment issue we would contend that the state has not offered one shred of evidence to show how integration of cells leads to violence. In fact the state has offered evidence that in the dormitory bunks although they do segregate the bunks, black bunks and white bunks, all of the different races are in the same building and there are no problems with violence that have been put into the record.

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In the job situations they have integrated, no situations of violence.

THE COURT: Yes.

MR. HILGER: There have been no studies, there has been no evidence presented through discovery at any point, that shows that there is any rational connection which is the loosest standard applied by *Turner*, to race and integrated cells. And that is why we would request the Court to reconsider granting summary judgment in Mr. Johnson's favor but leaving open the issue of damages, because we agree with Your Honor that the question of what to do about this is huge and should be dealt with at trial. We're not -- we're just [21] claiming liability, that the state has a policy which is illegal and that there is no connection between their policy, only talking about race, I don't think they should -- race and gangs go together, they're separate. So --

THE COURT: Well no no, there is some correlation. That doesn't mean that every black person is a gang member or every white prisoner is a member of the Arian brotherhood or every Latino is a member of the Mexican Mafia. But those groups do tend to self organize by race --

MR. HILGER: We -- I agree.

THE COURT: -- and this is something a practical problem that the prison authorities have to agree -- have to deal with. Now, really your question comes down to this. And first let's look at the part where the prison authorities in effect is meant segregating by race and that's the first sixty

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days at the inmate reception center and thereafter for some undetermined period at each new institution where the prison comes while they evaluate that prisoner.

There is, it seems to me a question of whether that is a sufficiently rational connection if it's limited to a temporary period to survive your *Lee* rule, based on one of those *Turner* tests of a rational connection to a legitimate penalogical objective, that is to keep the gangs apart.

And the argument I understand the state to be making, is that it takes us a little time to figure that out. [22] Now, I don't know whether that argument is going to hold water or not when it comes down to trial time. It may not. There is a similar case out of the 5th Circuit what is it *Slockcom* (sic).

MR. HILGER: *Sockwell v. Phelps.*

THE COURT: Yes. Where same thing apparently, well that was apparently on permanent living considerations not temporary. But the 5th Circuit came down pretty hard --

MR. HILGER: Yes.

THE COURT: -- on that. And now here in California you apparently have a situation where the prison authority is saying, we need time to evaluate the danger before we get into the integrated system. Then there's a second question of once they get past the situation, whether they actually do get into an integrated situation. And they say we give the opportunity, query whether that's enough. It seems to me that that's a question of trier of facts is going to have to evaluate.

MR. HILGER: I would again -- I would agree on the second point, I think that's a question of damages. On the first point I would ask Your Honor to consider the thought that the argument that they need time is really sort of smoke and mirrors. Because if they need time to make sure that people aren't from rival gangs then logically it would make sense for them to put a white with a black and a Asian, a [23] Japanese with a Chinese, they're concerned about Japanese and Chinese killing each other.

It would make sense for them to put people who they knew wouldn't be of rival gangs. You can be pretty sure that an Asian and I don't know what all the intricacies are, an Asian and a black probably aren't going to be from rival gangs. And it might even make more sense for them to put opposite races together in that waiting period. The fact that they don't do that leads me to believe that it really is just a scapegoat for their desire to rest on their generalized fears of racial violence. What Director Cambra told me in deposition wasn't that it -- this was a temporary solution, what he said was if I put a black and a white in a cell together I'm setting them up to kill each other. And I'm paraphrasing but that was -- and I can find direct language, that was the crux of what he was saying.

Again, what Warden Solte said, if you put a Japanese and a Chinese togther they will kill each other. There's no question about it. That kind of thinking is what needs to be undone. And I believe that it's not -- because the law is so clear I don't think the question of whether it's temporary or permanent really is -- I think that is a legal issue. And I think that's left for the Court to decide today rather than at trial, I

don't think that's really a question for a factual question. Whether that is [24] constitutional to allow that temporary time period because that's what is being plead now here in front of this Court.

So I would just leave --

THE COURT: As I looked at the file I didn't see much on how a prison authority -- prison authorities can tell either at the inmate reception center down in Chino or at one of the prisons, what immediately tell, what gangs a prisoner belongs to. There just, didn't seem to be a posse of evidence on this. I suppose you can ask the prisoner and maybe he'll tell you the answer and maybe he won't.

MR. HILGER: There's a blank space on that form 135 which is other information and I suppose that would be where that goes although --

THE COURT: Well that's where they may write it down once they learn. How do they learn?

MR. HILGER: Well they have that -- this is probably more of a questions, but I believe they have background information. By the time they get to prison there's already a file, there's a police file, there's all this other kinds of stuff that travels with them --

THE COURT: Well yes --

MR. HILGER: -- and they sometimes know and sometimes don't. But them sometimes already know.

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THE COURT: If it's like the federal system, the probation report --

[25] MR. HILGER: Right.

THE COURT: -- which has a good deal of information that goes with the prisoner to the prison authority.

MR. HILGER: So if the systems working they should already know by the time they get there.

THE COURT: I assume -- well maybe yes, maybe no. I assume that that's done in the state system too. Although I spent twelve years on the superior court, I don't remember what goes with a prisoner to Chino, to inmate reception. I do know at Chino they have a very intensive study period with regard to each prisoner. They go through a battery of tests, they go through several interviews and what they're doing is trying to classify the prisoner by danger and also ability to do work so that -- and what kind of setting they want to set him in. They want to know his drug background, whether they have to send him to a facility that has a drug treatment facility and a whole range of other things.

And at the end of that period and they say it takes about sixty days, that's when they designate the institution the man goes to.

Frankly, I don't know how much of that information. goes with the prisoner to the institution --

MR. HILGER: Well --

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THE COURT: -- because apparently when the guy arrives at the particular institution and Mr. Johnson I gather [26] went to Folsom first, that's one of the heavier institutions in the state system, at least it used to be. As I read the testimony of these directors and the system wardens, there are a couple of them, they again go through an evaluation process at the prison. They don't tell me how long that takes or why it's necessary in addition to the information they get at the inmate reception center.

I don't think that those facts are in this record and maybe the subject of inquiry at the time of trial. Okay --

MR. HILGER: Again, I would respectfully argue that that would be an issue of damages as a final result if the state is held liable. And lastly, before I sit down I would just like to put this in front of the Court in case the Court didn't get it from the record, what Mr. Johnson is requesting, and my opponent has no authority to do this but the Court does, is requesting in the interim a transfer to federal prison where he believes that this race based cell housing is not an issue. So, I would just like to leave that with the Court here today.

THE COURT: If he isn't convicted of a federal crime there is no way he's going to be in a federal prison. If he commits a federal crime, yes we tend to take them away from the state and put them in federal prison, but he's going to have to go out and rob a bank in order to get into a federal [27] prison.

MR. HILGER: All right.

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THE COURT: Ms. Turner.

MR. HILGER: Thank you.

MS. TURNER: Good morning, Your Honor. What I would like to add is we have a couple of problems in this case. First of all, it's a claim for damages because it was brought against two former directors and in the interim of the case which was brought many years ago, both of them retired --

THE COURT: Yes, I gather --

MS. TURNER: -- and that was Mr. Gomez and Mr. Rowland --

THE COURT: -- Mr. Cambra has been added --

MS. TURNER: I'm sorry.

THE COURT: -- I gather Mr. Cambra has been added?

MS. TURNER: No, Mr. Cambra was never served with a copy of the complaint. Mr. Cambra is the only person however, who could effect an injunctive relief because neither of those two directors have any -- had any connection.

THE COURT: You may want to pay attention to that one Mr. Deixler. Go ahead.

MS. TURNER: So as to the issue --

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THE COURT: I read the papers I assumed that Mr. Cambra was a defendant, he was referred to at one point as a [28] defendant.

MS. TURNER: Yes, he would be the only one under Rule 25 if the -- you know, if you do have a claim for injunctive relief and you have the -- lost the person in this case the directors -- we've lost a couple since then, there's been actually two in the interim for Mr. Cambra and on top of that Mr. Cambra has since retired. However, he has --

THE COURT: Oh, fine.

MS. TURNER: -- he has agreed to stay on until his replacement can be picked.

THE COURT: Okay. Well there also suing you under 1983 for damages.

MS. TURNER: They're suing the former directors, they've never served Mr. Cambra and the former directors have long since gone and I don't believe he has established any claim for damages against the former directors. Which is why I asked that they be dismissed under a qualified immunity argument.

I understand if we are going to go on -- however I would like to address that, carry the case forward, it would be only an injunctive claim unless he would be -- you know, Mr. Cambra or his successor is sued for damages. Beyond that they never brought him in for damages.

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THE COURT: Well okay --

MS. TURNER: And I don't believe there are any [29] damages.

THE COURT: -- I didn't see that raised in your papers.

MS. TURNER: I raised the rule -- I raised it in my motion for summary judgment and I always refer to him in his official capacity and we did raise it with Judge --

THE COURT: Judge Marshall.

MS. TURNER: Judge Robbins.

THE COURT: Oh --

MS. TURNER: Excuse me we've always been before Judge Robbins until today.

THE COURT: Well, Judge Robbins, you mean Magistrate Judge Robbins?

MS. TURNER: Yes, Magistrate Judge Robbins.

THE COURT: Well okay --

MS. TURNER: We raised it on the record with him and --

THE COURT: He handles the discovery.

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MS. TURNER: Yes, yes.

THE COURT: But he wouldn't have anything to do with the pleadings. You're going to have to take that one up with Judge Marshall.

MS. TURNER: Okay. Yeah well under Rule 20 --

THE COURT: I gather Judge Marshall in effect inherited the case when Judge Wardlaw went on to the 9th [30] Circuit.

MS. TURNER: Yeah. Too bad she didn't get to sit in on that case up in the 9th Circuit too.

THE COURT: Well, she may see it again.

MR. TURNER: Your Honor, I believe that the *Turner* analysis which -- that is an absolute, you do understand the case and I do appreciate that that you have reviewed it for that. But I believe it's a decision for the Court to make, it's very difficult and actually if this is only a case for injunctive relief, it will be a Court issue most likely, I don't see that going to to the jury.

THE COURT: But you can't call, even if there are court issues, you can't call them on summary judgment if there are fact evaluations to be made.

MS. TURNER: I understand that.

THE COURT: That's your problem.

MS. TURNER: I understand that, but under *Turner* it's for the Court to decide whether there is a valid rational connection between the policy and the penalogical interest. We understand the penalogical interest --

THE COURT: Okay but factual items go into that determination.

MS. TURNER: Yes.

THE COURT: I don't get to declare that on summary judgment. I can read all these papers and have opinions as to [31] how the case may come out.

MS. TURNER: Well and --

THE COURT: I cannot implement those opinions --

MS. TURNER: I believe you can.

THE COURT: No I can't, because what you've got is and you've got to make here an evaluation of the reasonableness, if I can put it that way, of the policy first at the inmate reception center --

MS. TURNER: Okay.

THE COURT: -- where they keep them segregated by race, I think it's a fair summary although it's fuzzed up with they don't put two smokers together And they don't -- they want to make sure they're reasonably close in age so they'll be compatible and that type of thing. Those are also factors,

but -- and they make it very clear that they do not two people with different races together during the first sixty day evaluation period.

And then apparently for an unknown period when a guy arrives at the final resting place so to speak, the institution designated by the inmate reception, there's another initial period of the evaluation before he's subject to this cellmate selection process. Then you've got a question, a factual question which has got to be evaluated of whether that is something that exists in the real world. Mr. Johnson in his declaration says, no he was never told that. [32] And he's been in an awful lot of the institutions run by the State of California over his fifteen year period and he's never been offered his -- never been told he had a choice of cellmates and in fact he's just been celled together with another person of the same race.

As against the testimony of the -- I think it was mainly the assistant warden, one of the directors, that an inmate may select a cellmate, who if agreeable, that they will do their best, which is apparently the normal routine to put them together. Now, whether that is a sufficient answer to your *Lee* doctrine is I think, another question for your trial judge.

MS. TURNER: Well, Your Honor --

THE COURT: And not to be called by a Judge on summary judgment. Now if you and I and Mr. Hilger went into chambers and sat down and discussed it we might come up with a reasonable solution. But can't do it that way.

MS. TURNER: Yeah, I understand. Well, Your Honor, I don't think -- I'm not certain if Mr. Johnson knew or not. Mr. Johnson has very low IQ unfortunately. He -- it's -- but certainly --

THE COURT: Yes, I saw that in the record.

MS. TURNER: -- yeah and I don't know -- and I talked to him at his deposition and we talked fairly frank and told him and he didn't seem to know.

[33] THE COURT: How did -- he may have a low IQ, but he wrote a complaint that can, that got past the 9th Circuit.

MS. TURNER: Hey, he beat me, that's for sure. But you know, just with this one individual and there are a hundred sixty thousand in the Department of Corrections right now --

THE COURT: Right.

MS. TURNER: -- there is successful integration, there is indeed and I presume that's going to have to be brought out in trial. I believe the wave of the future possibly will be that they will completely just perhaps disregard race into -- in housing. I don't know, but I know right now they say it rational that they cannot do it. It would be irrational for them to take any other steps given the crime and the violence in prison already that they cannot control.

THE COURT: At the inmate reception center --

MS. TURNER: Yes.

THE COURT: -- down in Chino, let's say you have two people both of the black race, one has a history of being a member of the Crips and one has a history of being a member of the Bloods, if this is known to the prison officials --

MS. TURNER: Yes.

THE COURT: -- they don't put them together.

MS. TURNER: No, and if it's known they do not, no. [34] And if they find out they take them out probably. How -- it is you talked about colors is one way that it is known, the inmates know. Sometimes it's a pin, it's you know, the blue tip versus the black tip sitting in their pocket, but the inmates know -- tatoos of course are various obvious. But no, they don't want to have violence inside the cells. The cells are only -- they're what --

THE COURT: Well, yes.

MS. TURNER: -- six by eight feet I think and you have two men in them --

THE COURT: There's been some lawsuits about double celling cells originally designed for --

MS. TURNER: Yes, there have.

THE COURT: -- single prisoners in this court.

MS. TURNER: And the Supreme Court did not have *Turner* when it decidedly and it was a very -- *Lee* just fits on

one page, the actual opinion, it's a very, very short addressing of the issue that was before it and I don't know -- I'm certain that perhaps in the South there were prisons that were -- segregated completely I mean, one hundred percent, that would be my suspicion --

THE COURT: Yes.

MS. TURNER: -- seeing this case in 1968 rising up to the supreme court like that.

THE COURT: Yes.

[35] MS. TURNER: Yeah. And now we have --

THE COURT: No doubt. And in fact apparently if you looked and read this 5th Circuit case apparently it's still going on -- was going on in Louisiana until the 5th Circuit stamped on it very hard.

MS. TURNER: Yes, and that starts to say that there is disparate treatment, I mean you have two people who are being treated differently. In this case everybody is treated the same it's just that you know, probably the ideal situation is to select your own cellmate. Mr. Johnson does know of the practice now, it's really not a -- it's a policy for selecting your own cellmate and he still hasn't done it, he's never done it. He's now at a new institution, he can find someone whom he's compatible with from any race.

And I believe that is a rational response to the problem. And I almost feel you know, I feel that they have done a

good job at the Department of Corrections to implement that and to -- and I've seen in seven years that I've been with the prison law office there in the Department of Corrections, I have seen them try very hard to minimize the violence. And I believe that this is doing everything that they can and I don't want -- I would like to the see the Court exercise its powers under *Turner* where it is a Court decision and just determine simply that it's not irrational. That's all they have to do, you don't have to agree with it, they [36] don't have to agree with it, the public doesn't have to agree with it, you just have to determine that it's not irrational. And that's what the Supreme Courts is holding in *Turner.*

THE COURT: Here's the problem, on the facts that I've got here, I can't make that call. I think your trial judge is going to need to make that call based on more facts than we have in this record.

Now for example, and you know when I was a Superior Court judge I visited the inmate reception center, I know what it is, I know what it looks like, I know generally what they do down there and that's described in your papers and they take about sixty days with continual flow of new prisoners coming in everyday to try to classify these people and decide what institution they go with. Some of them even stay at Chino. I gather that's fairly low security prison, at least it was when I visited it many, many years ago.

And I gathered that for fairly low security prisoners where they can live in a dormitory setting, you don't have a problem and there's no challenge to that in this lawsuit.

MS. TURNER: No, they can.

THE COURT: They apparently are fully integrated as the federal law, *Lee* case requires. Now, you've got that first sixty days down at Chino. You're going to have a question of evaluation by a trial judge as to whether [37] a -- what in effect is a segregated system, is necessary to at least for that period for this classification process. And frankly based on what is in here, I can't call it. I think it's got to be called by somebody who has more information about it than I have on this summary judgment papers.

Now next stage, the man is transferred to say Folsom or Calipatria or Lancaster, he again is double celled, apparently with racial classification being one of the more important considerations, I won't call it the only consideration, because the prison officials now want to -- of the institution where he's arriving now want to reevaluate. All right you've got a fact question. Based on the information they have available to them, is that necessary to have that period of -- in effect racial segregation at the new institution. If it is for a limited period of time, in order for the safety of the inmates and the guards which is the argument made by the CDC here, then after that process is finished is there in effect desegregation in the real world. You've got contrary testimony of Mr. Johnson that he never heard of and never saw a two man cell which was integrated in his fifteen year soldiering in the state prison system.

He says it never it happened, well okay. If it never happens is it really a realistic policy that the Bureau of Prisons has or is it purely a matter of self selection and is -- appears self selection sufficient to meet the [38] constitutional task?

Those are questions that I don't think can be answered on summary judgment which is why I'm leaving your second claim --

MS. TURNER: I understand.

THE COURT: -- alive for Judge Marshall to struggle with.

MS. TURNER: Your Honor, would you then also on that though, consider --

THE COURT: By the way, I didn't think much of your argument that he doesn't understand me.

MS. TURNER: Yes, I --

THE COURT: You know --

MS. TURNER: I saw that you didn't think too much of that however, I am looking at it for the injunctive portion of it.

THE COURT: Which portion?

MS. TURNER: The injunctive portion of the complaint.

THE COURT: Okay.

MS. TURNER: You know he's the only one complaining out of a hundred and sixty thousand inmates unless I'm missing something, I know of no other case. And he has never tried --

THE COURT: He's the one the 9th Circuit says he states and claim and it's come back to the District Court and [39] they say take the case up and treat it seriously and appoint counsel to bring order and sense into the case.

MS. TURNER: Well he did state a --

THE COURT: And by God --

MS. TURNER: -- bit of a different claim before he went there.

THE COURT: -- they did appoint counsel who brought order and sense into the case.

MS. TURNER: Yes, they did.

THE COURT: And I want to thank you gentlemen for taking on that duty which must not -- it can't have been a profitable task. Is it basically pro bono unless you win the case, Bert?

MR. DEIXLER: Yes, but we at our firm we say, to much -- to one who much is given much is expected so, that's our responsibility Your Honor, we're pleased to do it.

THE COURT: Yes. Okay, Mr. Deixler was an attorney in a case that really was worth money in my court here a couple of years ago.

MS. TURNER: Well, those are the -- I think that I've pretty much -- I would like you to reconsider on the two

directors who have long since retired and have taken up fishing and swimming and living their lives elsewhere outside the Department of Corrections, since they cannot effect any change in the department and I don't think that he has proven [40] that he has been damaged. I've given them an opportunity to do that and they haven't.

And so for qualified immunity at least to dismiss the two --

THE COURT: But those aren't the tests for qualified immunity.

MS. TURNER: Whether their immune from suit is the test.

THE COURT: Whether they're what?

MS. TURNER: Immune from suit.

THE COURT: Well, yes, but that depends on whether (A) there's a constitutional violation and (B) whether the law was clear at the time constitutional violation took place. That's still an open question and it -- whether their out fishing isn't the question on qualified immunity. Now it may be that the plaintiff doesn't have an interest in keeping him in here for damages and they would prefer to join the present director of the department in order to have the right kind to get an injunction again, I'll leave that up to them to consider.

You might have a talk with Mr. Deixler about that.

MS. TURNER: Well we have --

THE COURT: -- take him up to the fourth floor coffee shop, buy him a cup of coffee and talk about that.

MS. TURNER: We have spoken about that and he is [41] with Mr. Hilger and Mr. Cambra and the former director whoever he is today, tomorrow is in for injunctive relief. But not for damages. Now as to the two that have been sued for damages, they were sued for damages under the 8th, 14th Amendments. The 8th has been dismissed, he has not demonstrated any damage or any harm. And I agree with the 14th --

THE COURT: I'm getting rid of the 8th Amendment claim.

MS. TURNER: Yes, I understand and as with the 14th Amendment claim, he hasn't ever demonstrated any damages or harm by them either. They don't have -- he's never talked to them, never met them, never had any contact with them, never wrote them a letter, never told them that he had any problem with any of their policies. He may have like you mentioned he's suing them on responding on the superior theory of anything. They can't make any changes in the Department of Corrections. And I would ask that it be dismissed as to them.

THE COURT: That's not qualified immunity so I can't do that on summary judgment. All right, I'm going to stick to the tentative ruling. The first and third claims are -- on the defendant's motion are dismissed for on summary judgment.

The second claim, the equal protection claim is left alive and plaintiff's motions are for summary judgment are denied. I don't think -- I think the minute order states my [42] orders clearly enough in that I don't need to have a separate formal order unless either counsel believes and I need it.

MR. DEIXLER: It's not necessary for Mr. Johnson, Your Honor.

THE COURT: Right. Okay I'll mail this off to Judge Marshall and say here, you go Judge Marshall and she'll say, what you couldn't get rid of this case. Thank you, we're in recess.

PROCEEDINGS CONCLUDED AT 11:52 A.M.

APPENDIX Q — CIVIL MINUTES DATED JUNE 14, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 95-1192 CBM (BQR) Date June 11, 2001

Title *Garrison S. Johnson v. State of California, et al.*

DOCKET ENTRY

Priority	___
Send	✓
Enter	✓
Closed	___
JS-5/JS-6	___
JS-2/JS-3	___
Scan Only	___

PRESENT

The Honorable Harry L. Hupp, Judge

Arlene Chavez	**Cynthia L. Mizell**
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Bert H. Deixler ✓
Kenneth Ingber
Hilner ✓

ATTORNEYS PRESENT FOR DEFENDANTS:

Sara Turner ✓

Appendix Q

PROCEEDINGS: CROSS-MOTIONS FOR SUMMARY JUDGMENT

ORDER (also, if applicable, findings and memorandum opinion):

This constitutes notice of entry as required by FRCP, Rule 77(d).

The matter has been transferred to this court for the hearing of these motions only. All further proceedings will be before Judge Marshall.

These are cross motions for summary judgment on plaintiff's Fourth Amended Complaint (4AC). The 4AC has 3 claims: 1st--a § 1983 claim for violation of the Eighth Amendment (cruel and unusual punishment), 2d--a § 1983 claim for violation of Equal Protection under the Fourteenth Amendment, and 3d--a § 1985 claim for conspiracy to violate plaintiff's equal protection rights. Plaintiff Johnson moves for partial summary judgment on his 2d and 3d claims. Defendants Gomez, Rowland, and Cambra move for summary judgment on all 3 of plaintiff's claims. Plaintiff's motion for partial summary judgment is denied, the court finding triable issue of fact on the 2d claim and that defendants are entitled to summary judgment on the conspiracy claim. The motion of defendants Gomez, Rowland, and Cambra are granted as to claims 1 (Eighth Amendment) and 3 (conspiracy) and denied as to claim 2 (Equal Protection). Further, the motion of said defendants for dismissal based on qualified immunity is denied. This minute order is the court's order on these motions. No more

formal order is necessary. The result is that claims 1 and 3 of the 4AC are dismissed, and the case should go to trial on Equal Protection and (as to the individual defendants) on qualified immunity.

At stake are the housing practices of the California Department of Corrections (CDC) in housing inmates of differing races. Plaintiff challenges what he alleges to be discriminatory housing practices by CDC in double celling (where 2 inmates are housed in one cell). He alleges that during the administration of 2 former directors of CDC (Gomez and Rowland) and of the present director (Cambra), there is a practice of housing inmates together in double cells based on race--that is, that double celled inmates are by policy always housed together with an inmate of the same race. Plaintiff, Mr. Johnson, is an experienced inmate, having been an inmate since 1986 after conviction for murder, robberies, and ADW. He has been through the inmate reception center at Chino, and subsequent state prisons at Folsom, Calipatria, and, now, Lancaster. At each facility, he was double celled with another black inmate. He has never made a request to be celled with a named person of another race, so there is no evidence against the reality of claimed CDC policy of allowing same if requested.

The evidence is not in great dispute as to many items. CDC acknowledges that at the inmate reception center, and upon transfer to each new institution, a defendant is normally initially double celled with an inmate of his own race. After initial evaluation (about 60 days at the inmate reception center), if the prisoner is of a security level to be placed in a dormitory facility, he lives in a desegregated facility. If he is

double celled, he and another inmate (of whatever race) may request to be celled together, and this request will normally be granted. However, defendants do not deny that the initial placement is heavily based on race and gang affiliation (to the extent the latter, if any, is known). (Other factors are also considered--smoking, age, record of violence, etc). This initial placement is justified on facts, known to the prison officials, of heavy influence of gang background on prisoner behavior. Thus, there are major safety concerns of placing known members of gangs in the same cell with known members of rival gangs. With regard to initial placement, the prison officials say that immediately on arrival at the inmate reception center, or on arrival at a new prison, the officials cannot know the relevant history; hence they use the safest method of normally placing members of the same race together (presumably not placing Crips and Bloods together). This is based on a factor believed by prison officials--that gangs are normally already self segregated by race (i.e., Mexican Mafia, Aryan Brotherhood, Crips, Bloods). Thus, the initial placement is to recognize these realities until studies, investigation, experience, and classification can tell them otherwise. Moreover, there is an issue of fact as to whether, following classification, the CDC follows a policy of desegregation, or merely allows self selection among prisoners desiring desegregation (plaintiff testified that he never saw a desegregated two person cell; on the other hand, he never asked for one).

There are a number of cases on this problem, but the two most important are *Lee v. Washington*, 68 390 US 333, 19 LEd2d 1212 and *Turner v. Safley*, 87 482 US 78, 96 LEd2d 64. *Lee* established the principle that segregation violates

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Equal Protection inside prison as much as outside it, with the significant caveat that ". . . prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Turner* makes it clear that "strict scrutiny" does not apply; the test is one of deferential review. Under *Turner*, 4 tests are applied: 1. A rational relationship between the regulation and the governmental interest at stake, 2. Any alternative means available of recognizing the right in a prison setting, 3. The impact of recognizing the right on prison resources and guards, and 4. The availability of ready alternatives. The important question here is how to apply these tests to the Equal Protection argument. In the court's opinion, they cannot be applied in a summary judgment setting. From defendant's papers, they are most concerned about prisoner safety related to racial gang antipathies. The logical method, if feasible and possible, is to determine at an early date whether any two prisoners are subject to relevant gang connections (these also may be between two members of the same race, i.e., Bloods and Crips, or (see declaration of O'Neill) between Northern and Southern Hispanics). If segregation temporarily is permitted pending classification, the basic rule is still integration under the *Lee* case; there is a question of fact as to whether it is carried out in the CDC. Accordingly, the motions of each side for summary judgment on the Equal Protection claim is denied.

Cruel and Unusual Punishment is inapplicable here. Mr. Johnson has undergone no hardship and he expresses no dissatisfaction with his cell-mate or injury to himself except for a policy with which he disagrees. If his rights have been

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violated, it is under the Equal Protection Clause, not the Eighth Amendment. The 1st claim is dismissed.

Mr. Johnson has standing to sue for a violation of Equal Protection, as held in the District Court opinion in the *Lee* case and affirmed by the Supreme Court. This part of defendants' motion is denied.

There are no facts showing conspiracy. The CDC has had the same policies through the administrations of three directors. This does not show that they conspired with one another. The conspiracy count must be stricken.

The court is not ready to grant qualified immunity at this stage. *Lee* established that Equal Protection applies to housing of prisoners. *Turner* stated the tests to be applied. There is no lack of law on which a finding of qualified immunity could be based. How the facts play out in trial will determine whether qualified immunity is a viable defense. That portion of defendants' motion is denied.

At the recommendation of the Ninth Circuit (when reversing dismissal of the case following the Third Amended Complaint), the court requested plaintiff's lawyers to take on the case. The court expresses its appreciation to plaintiff's counsel for the order and logic they have brought to the case.

APPENDIX R — HEARING TRANSCRIPT OF DEFENDANTS GOMEZ AND ROWLAND'S MOTION FOR RECONSIDERATION OF DENIAL OF QUALIFIED IMMUNITY DATED JULY 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES, CALIFORNIA

Case No. CV-95-1192-CBM
(BQRx)

GARRISON S. JOHNSON

Plaintiff

vs.

STATE OF CALIFORNIA

Defendant

Los Angeles, California
July 30, 2001
10:18 a.m.

DEFENDANTS GOMEZ AND ROWLAND'S MOTION FOR RECONSIDERATION OF DENIAL OF QUALIFIED IMMUNITY

THE HONORABLE HARRY L. HUPP, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

Appendix R

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PROCEEDINGS BEGIN AT 10:18 A.M.

(Court is Called to Order)

THE CLERK: Item Number 3, CV-95-1192 CBM, Garrison S. Johnson versus State of California. Counsel, please state your appearances.

MS. TURNER: Sara Turner, Deputy Attorney General on behalf of defendants.

THE COURT: All right.

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MR. DEIXLER: Good morning, Your Honor. Bert Deixler on behalf of Garrison Johnson.

THE COURT: Right. Mr. Deixler the -- appeared to me the Supreme Court kicked over the dope bucket on us after the last hearing and that's what we mainly have to deal with here.

MR. DEIXLER: Yes, I think we do and let me start by dissenting from your fundamental starting point. I don't read the, I'll call it the *Saucier*, I don't know if it's pronounced that way or not --

THE COURT: Well that's what I've been calling it.

MR. DEIXLER: The *Saucier* case applies at all in the context which we find ourselves. That is a 4th Amendment excessive force case.

THE COURT: Yes.

MR. DEIXLER: In which the starting point of the analysis is the notion of haziness of the lines and where can [4] we draw the lines. And having myself tried such cases on behalf of municipalities I understand, as well as having been a federal prosecutor, I understand that world pretty well. And understand why in that context that we may have a standard.

And I also understand very well the notion of immunity and the notion that is supposed to be an immunity from suit and not just an immunity from trial.

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THE COURT: Right.

MR. DEIXLER: But even, God help us, these five justices, even applying their analysis --

THE COURT: Was that a five to four decision?

MR. DEIXLER: It was five to three to one. If you can try to reconcile it, it's a little difficult.

THE COURT: Yes.

MR. DEIXLER: But even applying the analysis which they offer in the context of Johnson's case seems to me that this is a case in which the Court's initial ruling was exactly right and the law of the 9th Circuit and the Supreme Court hasn't been affected in any way by *Saucier*. And I'd like to just sort of look at the --

THE COURT: Except that they reversed the 9th Circuit.

MR. DEIXLER: I understand that. I understood they reversed the 9th Circuit in the context of that case.

[5] THE COURT: And *Saucier*, which I gather is not a unique event.

MR. DEIXLER: It's happened before I've --

THE COURT: Yes, right. But this whole qualified immunity doctrine, particularly in the 9th Circuit, has a history. And as you may recall it started with the *Harper*

case back in the Nixon administration and then *Creighton against Anderson* and then *Harper* against somebody a non -- a summary decision and unite which left, all of those decisions left the trial court somewhat at sea as what you do when the facts, the basic underlying facts are in dispute. Now, in act of *Portland* Judge Hall tried to lay out a formula for the trial courts to follow in a very -- it was a very difficult process because of the way the Supreme Court had left the case particularly in *Harper*.

But Judge Halls opinion in act *Up* left it that were the basic evidentiary facts concerning the application of the constitutional doctrine at stake, whatever it was, were a dispute the trial judge should get the jury to determine not just all the facts which is what a jury normally does, but the evidentiary fact issues which would allow the trial judge then to apply the qualified immunity doctrine. Then that was followed by, in the 9th Circuit by a series of cases in the excessive force area. Where the allegation is that the police officer used excessive force in conducting an arrest or a [6] detention or in some way used excessive force on the plaintiff in violation of the 4th Amendment as you say.

And the 9th Circuit eventually came to the conclusion in a couple of cases, that since excessive force has to be defined as the application of an unreasonable degree of force necessary to secure the arrest and that the qualified immunity doctrine was what a reasonable officer in the circumstances would believe was necessary force to secure the arrest, that these were obverse sides of the same coin and in effect held that the trial judge should submit the excessive force issue to the jury. They did this in a case or two before *Saucier*

and again did it in the *Saucier* case itself. At least the trial judges thought we had a formula, not a very easy one to apply because you normally don't submit evidentiary fact issues to a jury. You submit ultimate fact issues to a jury, nevertheless, the language of *Harper* and *Anderson against Creighton* seemed to require result that Judge Hall outlined in act *Up*.

I didn't write all of this in the tentative ruling, but you see I've been through it --

MR. DEIXLER: I recognize your familiarity --

THE COURT: -- then here comes *Saucier* and Justice Kennedy in that opinion says the 9th Circuit has it all wrong, you do not send these issues to the jury, the trial judge determines them before trail. He doesn't expressly say that [7] the trial judge makes evidentiary fact rulings when the facts are disputed. But then he proceeds to do precisely that in the *Saucier* case. And the five man majority analysis the facts of the alleged excessive force and said this isn't excessive force when the police officers were alleged to figuratively speaking, grab the demonstrator by the scruff of the neck and the seat of the pants and heaved him into the van. That may not be exactly how it was described in the opinion, but that's what they were alleged to have done. And that was alleged to have been excessive force.

And the Supreme Court proceeds then to make the factual determination that this was not excessive force. Well where does this leave us? Again, they reemphasize their language that qualified immunity is a doctrine that is designed to

prevent a defendant from having to go to trial. And they were emphasized that in saying the 9th Circuit was all wet in saying you ever submit this question to the jury. Apparently saying that at any rate.

And apparently, even though they don't expressly say so, make it necessary for the trial judge to determine these factual issues on motion prior to trial. This doesn't make much sense to a trial judge, I'll have to admit and in fact Bill Norenson (phonetic), one of his descents in one of these excessive force cases pointed out the practical difficulties that the trial judges have in applying qualified immunity. [8] And he was right.

But nonetheless, that's what the Supreme Court seems to be saying. So come down to this case you have two directions of the CDC, California Department of Corrections, who have in effect administered policy which is alleged in this lawsuit to be unconstitutional. And where there is a good argument that it is unconstitutional under the *Lee* case by the standards given to us in the *Turner* case and that there's a very good argument that this initial segregation until they find out more about the individual, does violate the principles of the *Lee* case.

There's that caveat in the *Lee* case which does throw a little dust in the air as to whether in a particularized circumstance a prison official may consider racial tensions, I think was the way the Supreme Court put it, as a -- in making their decision. All of which leaves a little uncertainty floating in the air as to whether the policy alleged to be followed by the Department of Corrections violated the equal protection

clause. Which I said on the first time around here and therefore said was a triable issue of fact.

And then here comes *Saucier* and says, uh uh Judge at least as far as qualified immunity goes that doesn't cover your injunction claim against the present director of course. But at least so far as the claim for damages goes under qualified immunity the judge has to decide it on the motion. [9] Not planning to go to trial if there's any doubt whatsoever in either how the facts apply or what the law is, I gather there's some doubt on both issues here.

Now Mr. Deixler, I'm sorry to give you this long -- I'm sorry to get up on my soapbox and give you this long tirade on qualified immunity. Frankly, I don't think the Supreme Court has recognized the practical problems that the trial courts have in applying their doctrine. But far be it from me to criticize the Supreme Court. My job is to apply what they say if I can figure it out. And so that's what I'm trying to do here.

MR. DEIXLER: I don't in the slightest, question your good faith analysis. And if you would just let me have my two minutes on the soapbox I would love to persuade you.

THE COURT: Of course. Hey, I always like to listen to your arguments because they're always so cogent. Go ahead.

MR. DEIXLER: Puts too much pressure on me, Your Honor. I'm prepared to accept virtually everything that Your Honor has said with regard to the history and much of what the Court has said with regard as well to the equal protection

cases that we're analyzing. But I don't think *Saucier* is as bad for me as Your Honor does. And I think setting aside my general observation that the 4th Amendment area is unique in this kind of analysis, I think if you take *Saucier* on it's own terms it's not quite as blunderbuss as Your Honor has [10] summarized it to be.

I think it sets forth a test which if applied here in conformance with it's peculiar articulation, still allows me to go on in this case on behalf of Mr. Johnson. And let me just see if I can analyze what I think are the key charging paragraphs of this piece of Supreme Court work.

The first inferring must be whether a constitutional right would have been violated on the facts alleged. And I think in this case on the facts alleged there's a constitutional violation. Second, and again all of the facts are to be construed strongly in my favor --

THE COURT: Right and I accepted that proposition in my minute order here.

MR. DEIXLER: Second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals. And that seems tome to be a broad articulation without much substance until we explore it a little bit. And what they do is they wander in the wilderness here on this facts, is say take into light most favorable to the party asserting the injury, did the facts alleged show the officer's conduct violated a constitutional right. Which I think restates what they've said before and re-frames it slightly differently.

And then they go on to say the relevant disposit of [11] inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in a situation he confronted. And then they go off into 4th Amendment type analysis and they say we're going to assume a constitutional violation, but this is close enough for us to apply the broad policy of immunity.

So it seems to me the Court's analysis ought to be whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. And that's really the test the Court is asked to apply here, a difficult test I concede. But one which in light of cases starting as early as 1974 in Ohio, 5th Circuit case in 1994 and almost the blue Buick type facts were the ones we confront here. The justification offered for this segregation in its policy, in the broad way that it has been articulated factually in this case, has been rejected.

So we have twenty years-ish of constitutional teaching which tells us that a reasonable officer would have known that the positions articulated, the CDC head, the position articulated are unconstitutional that there must be a much more fact specific justification then the justification which was offered in this case. Now it may be that Your Honor is exactly right, at the time of the trial in cross-examination that they'll be able to hone in their argument and they'll be able to point to some specifics.

[12] But on the factual presentation which was made by the attorney general in this case it was this broad kind of airy

concern about maybe something could happen and therefore we're going to segregate our prisoners. Well that's not constitutionally permissible. And so I think under *Saucier* I still get a shot to put this case on. The attorney general gets to put the case on and if there are specific facts that are going to justify it, I'm going to loose. And the earliest time the qualified immunity properly could be applied is after Your Honor perhaps, hears the explanation offered at the time of trial, listens to it and evaluates it. You may not need to go beyond the jury.

But on the evidence which was submitted in opposition to our motion I submit Your Honor, and invite the Court to go back again on the facts. I think that we're here for a trial.

THE COURT: The problem is that in writing the *Saucier* opinion just as Kennedy reached back to *Creighton against Anderson* and the *Harper* case and what was the original, *Harlow* case.

MR. DEIXLER: Right.

THE COURT: And reemphasized what looked to me like figuratively exclamation points, that qualified immunity is a doctrine which allows a defendant if there's any real doubt to not go to trial. The government defendant doing exercising [13] discretionary functions. And the trouble is he's saying I think not only from how they phrase it, but what they actually did in the *Saucier* case, that it's up to the judge to make those factual calls prior to trial as to whether it's possible the defendant could win the case and if so the defendant is entitled to qualified immunity --

DEIXLER: I don't disagree with Your Honor.

THE COURT: -- he's really cutting the heart out of the 1983 actions by doing this. Because he's applying in an excessive force case where the difference between the plaintiff's burden and the defendant's burden is so thin that I can't see a difference between the two. They look to me as I posed it earlier, like adverse sides of the same coin, but the defendant has the burden on qualified immunity and the plaintiff on excessive force and it's the same issue. And he says you don't put that to the jury, if it's arguable.

Now, here the defendant has an argument about their concerns about racially oriented gangs in prison and the possibility of putting two people in the same cell who are members of enemy gangs is articulated as the reason for this policy of at least in the inmate reception center and then at the start of the period where a new defendant, a new prisoner comes into a new state prison, of taking a period of time to study the individual characteristics of this defendant. It's an argument that *Lee* leaves at least open a small knot hole, [14] maybe even a little larger crack, to crawl through as a defense.

Since it could be applied as I read *Saucier* I have to say, qualified immunity applies and that leaves you with your action for an injunction but not for damages.

MR. DEIXLER: Well, I certainly have understood the Court's rational, but again I have two points of dispute --

THE COURT: You see *Saucier* doesn't go that far.

MR. DEIXLER: -- I do not believe -- *Saucier* doesn't go that far, but I'll put that aside for the moment and just argue the facts of the summary judgment motion and see if I can't persuade --

THE COURT: Okay --

MR. DEIXLER: -- you on that one. Plan B here. The argument articulated in the opposition to the summary judgment motion --

THE COURT: Yes.

MR. DEIXLER: -- fails as a matter of law because it's this generic one size fits all, anything's possible, you put two black people together they could kill each other, that's the substance of what they said and it's no more specific than that. That argument cannot win we know as a matter of law, that's not a viable legal defense. If they said, we looked at Garrison Johnson and we look at his tattoos, we looked at Garrison Johnson's past history on the [15] street, then we're having a specific conversation about a specific person.

THE COURT: True.

MR. DEIXLER: And then I understand the factors which apply and I loose. But on the facts which were advanced in opposition to our motion in this case, it was the generic and legally insufficient argument. If that's so, if that's the best they can do given the prescience, then Justice Kennedy says that the test is whether it would be clear to a reasonable officer, that his conduct was unlawful in a situation

he confronted. They should know that generic one size arguments are no good, that it's not enough, that it has to be specific to engage in racial segregation as an act of governmental policy.

THE COURT: Remember that their position is that they only do this on initial receipt of the defendant until they can evaluate the particular person. They are not saying that for all times during the whole prison set up --

MR. DEIXLER: I certainly understand that has been their factual determination, but focused on that issue still it's undifferentiated racial discrimination without specific facts to support it and the law tells us you can't do that. You just can't say, put these two black guys together willie nillie. You just can't do that this -- it's not permissible. And that's what they said they've done.

[16] THE COURT: You know Mr. Deixler, I found you very convincing and I suspect you may have a very convincing argument in Judge Marshall's court for this case of course, by the time it comes up. *Lee* however, leaves it not quite clear exactly what they can do with regard to racial tensions because of the -- what I call the *Lee* copy-out.

MR. DEIXLER: I understand.

THE COURT: Which let's see -- prison authorities have the right acting in good faith and in particularized circumstances, whatever that may mean, to take into account racial tensions in maintaining security, discipline and good order in prisons and jails.

Now what these two directors or retired directors of the Department of Corrections say they do is, initially segregate and they agree that they do segregate by race and also attempt to keep rival gangs in the same race apart at -- for the first period of time at the inmate reception center, which I understand can be up to sixty days in Johnson's case I gather it was twenty-three days, until they find out about whether there is a problem. And it says, thereafter we will allow prisoners to select their own roommates and if it's reasonable we'll approve it, of whatever race. Those are for inmates that aren't in dormitories, which are all of course, desegregated, were in single cells for I protective reasons in effect are -- in a way your segregation [17] problem doesn't arise.

That's what they say. They have an argument that can be made, it's not flat out unconstitutional, you still have to win the case as to whether that's a reasonable argument. The difficulty is that when you come to applying the term reasonable in a qualified immunity case, as the Supreme Court I think made clear in the *Saucier* case by knocking over what the 9th Circuit has said about the rule of reason in excessive force cases, in saying we're going to decide it ourselves as a matter of law. They're saying these things have to be decided by the trial court, not as to whether there is a constitutional violation, but whether there's an argument at the pre-trial level.

Now, the 9th Circuit has been bucking I might say, quick against *Anderson* and *Harper* since it first came out and Judge Hall packed up and tried to find an accommodation with the foreman of those cases. Then the 9th Circuit carried it a little

further in excessive force cases and the Supreme Court did what they usually do, they slapped them down and said no way, we don't mean this. Declare a pre-trial on motions and that's what they did in the *Saucier* case.

Now, if you told me whether there's an issue of fact when the police are alleged to have taken the defendant and flung him into a van, that that's not a triable issue of fact on excessive force and you've come to me with a summary [18] judgment on that ground, I'd just in effect say har har, of course it's a triable issue of fact. What did the Supreme Court do? They decided the triable issue of fact. They said, well it wasn't serious enough in this case to rise to the level of excessive force, they're making their factual determination and they're saying the 9th Circuit should have done that and not allow the case to go to trial.

I think that they have revamped the 9th Circuit's approach to what qualified immunity is in these 1983 cases. Saying hey we meant what we said in *Anderson* -- was it *Anderson against Creighton* or was it *Creighton against Anderson*? I forgot which way it was --

MR. DEIXLER: Yes, Anderson.

THE COURT: -- and the *Harper* case which the 9th Circuit has never really believed ever since. I think we're there.

MR. DEIXLER: Well, Your Honor, the difference between Sisyphus and myself is that he didn't know when to stop. So I'm going to just submit it, Your Honor.

Appendix R

THE COURT: Mr. Deixler, I thank you, I appreciate your argument.

MR. DEIXLER: I appreciate your attention to the issue.

THE COURT: I think if you can take this to the 9th Circuit, if they're not shell shocked by now, maybe they'll [19] put it back.

MR. DEIXLER: Very well, Your Honor.

THE COURT: Ms. Turner, you want to comment on all this.

MS. TURNER: Well, no I know when to stop too, but I also just think that you know government attorneys are obviously were waiting for the decision in *Saucier* and it just happened to come that same week that we had been here arguing --

THE COURT: One week to the day after I decided the motion in the first place.

MS. TURNER: Well we did know it was out there and we were waiting for it. I know the Supreme Court usually rules before the 4th of July so. I do think though that the principal one that is very difficult in qualified immunity is that it's to permit officials which is what *Harlow* said to undertake their responsibilities without fear they'll be liable in damages for actions that appear reasonable at the time, but were later held to violate statutory or constitutional rights.

Appendix R

THE COURT: Yes. The way the Supreme Court is taking it they have taken it a step further. Because you can have qualified immunity and subject that to fact finding procedures in theory, by a jury deciding the evidentiary facts. And the Supreme Court says, no, this is a doctrine [20] designed to prevent the official from having to stand trial.

MS. TURNER: Right. Yes.

THE COURT: And then --

MS. TURNER: It's true immunity.

THE COURT: -- as I, of course you know I'm talking to the converted here, I couldn't convince Mr. Deixler on this one. The applyant (sic) -- now they do not explain, which is one of my principal gripes with Justice Kennedy's opinion, how a trial judge is supposed to administer this doctrine. Are we supposed to make evidentiary fact findings on motions in 1983 cases? Apparently so, because that's just what the Supreme Court did in *Saucier*. They made an evidentiary fact finding that flinging the fellow into the van was not excessive force because they say, well he wasn't hurt very much and maybe a little bruised and that's about it and that's not serious enough to bring a constitutional case under. They're doing fact finding.

MS. TURNER: They said it wasn't excessive, yeah they made a decision.

THE COURT: That's right --

MS. TURNER: Yeah. I don't envy your task.

THE COURT: -- and if I read between the lines of what they did as opposed to how Justice Kennedy failed to explain how the trial court is supposed to do this and you know, it implyably (sic) overrules also act *Up Portland* where [21] Judge Hall in her opinion, tried to set up a way in which this was handled which made as much sense as possible given the language she had to work with out of *Harper* and *Creighton*. She says, if you can grant it on summary judgment, do it. But if you can't and there's a dispute in the evidentiary facts, you submit that dispute to the jury and the jury decides the evidentiary facts and reports those back to the trial judge who then calls the qualified immunity question. That was her best effort to reconcile the problem of trial judges in applying that *Harper* case, which was I think the start of -- nobody was paying any attention to *Creighton against Anderson*, but *Harper* came out and all of a sudden the 9th Circuit sat up and they took the first case and they tried to write something that was practical for trial courts.

MS. TURNER: Well, Your Honor --

THE COURT: That's what I thought the law was --

MS. TURNER: Well --

THE COURT: -- until now until and except that the 9th Circuit in excessive force cases says, well it's the same question so you just send it to the jury. The Supreme Court is emphatically as I've ever seen them say anything, said no way. Well okay.

I feel sorry for the trial judge. I gotta change my decision I hear on qualified immunity for Rowland and Gomez and summary judgment is granted as to Rowland and Gomez, I [22] just signed your judgment.

And the case is still alive as to conjunction against the present head of the department of corrections --

MS. TURNER: Okay. All right, thank you Your Honor.

THE COURT: -- but that you can try out before Judge Marshall.

Mr. Deixler, you know, I know you're court appointed in this case and it certainly is not going to be what you might call a lucrative profitable case to take on. I want to say I appreciate your services in this case. Because you brought order and logic to what the 9th Circuit said. This is a mess. Appointed attorney, thank you.

MR. DEIXLER: Thank you, Your Honor.

PROCEEDINGS CONCLUDED AT 10:53 A.M.

APPENDIX S — ORDER GRANTING DEFENDANTS GOMEZ AND ROWLANDS' MOTION FOR RECONSIDERATION AND GRANTING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY DATED JULY 30, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

Case: CV-95-01192 CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

[PROPOSED] ORDER GRANTING DEFENDANTS GOMEZ AND ROWLANDS' MOTION FOR RECONSIDERATION AND GRANTING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY

This matter having come on before hearing on July 30, 2001, and the Court, having read and considered the motion by Defendants J. Rowland and J. Gomez for reconsideration of denial of qualified immunity pursuant to Local Civil Rule to Rule 7.16, and being fully informed, and finding no just reason for delay, pursuant to Rule 54(b), Federal Rules of Civil Procedure, hereby enters the following order:

Appendix S

IT IS HEREBY ORDERED that Defendants Rowland and Gomez are entitled to qualified immunity and that summary judgment be entered in favor of Defendants James H. Gomez and James Rowland and against Plaintiff herein pursuant to Rule 56, Federal Rules of Civil Procedure and this action be dismissed as to defendants Gomez and Rowland with prejudice forthwith.

DATED: 7/30/01

s/ Harry L. Hupp
United States District Court Judge

APPENDIX T — LETTER FROM TANYA L. FORSHEIT OF PROSKAUER ROSE LLP TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 26, 2003

PROSKAUER ROSE LLP

June 26, 2003

VIA U.S. MAIL

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94103-3939

Re: *Garrison S. Johnson v. James H. Gomez and James Rowland*
United States Court of Appeals for the Ninth Circuit
Case No. 01-56436

Dear Clerk of Court:

This letter serves to advise the Court pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure of the recently issued opinion of the Supreme Court of the United States in *Grutter v. Bollinger*, 2003 WL 21433492 (June 23, 2003). *Grutter* supports Appellant Garrison Johnson's Petition for Panel Rehearing With Suggestion for Rehearing *En Banc* (the "Petition"), currently pending before this Court.

Appendix T

In *Grutter*, the Supreme Court confirmed, in unambiguous language, that "*all* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 2003 WL 21433492, *13 (emphasis added) (internal citations omitted).

Grutter is relevant to Section II.A. of Appellant's Petition in which he argues that the Panel's application of rational basis scrutiny as enunciated in *Turner v. Safley*, 482 U.S. 78 (1987), a First Amendment case not involving any invidious racial classification, conflicts with decisions of other Courts of Appeal holding that heightened scrutiny is required for race-based prison regulations.

Very truly yours,

s/ Tanya L. Forsheit
Tanya L. Forsheit

cc: Sara Turner, Esq., Deputy Attorney General

(8)

Supreme Court, U.S.
FILED
JUN 3 - 2004
OFFICE OF THE CLERK

No. 03-636

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is a state's practice of routine racial segregation of state prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded under *Turner v. Safley*, 482 U.S. 78 (1987)?

2. Does California's practice of routine racial segregation of state prisoners for at least a 60-day period violate the Equal Protection Clause?

LIST OF PARTIES

The parties to this proceeding are petitioner Garrison S. Johnson and respondents the State of California, James H. Gomez, and James Rowland.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 321 F.3d 791 (9th Cir. 2003). Pet. App. 1a-31a. The Ninth Circuit affirmed the July 30, 2001, decision of the United States District Court for the Central District of California, which is unreported. Pet. App. 32a-35a. The Ninth Circuit's opinion denying a petition for rehearing with suggestion for rehearing en banc (with four judges dissenting) is reported at 336 F.3d 1117 (9th Cir. 2003). Pet. App. 36a-50a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on February 25, 2003. J.A. 8a. A timely petition for rehearing with suggestion for rehearing en banc was denied on July 28, 2003. J.A. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

The California Department of Corrections ("CDC") automatically segregates by race all prisoners upon their initial assignment to a CDC facility for a 60-day period, and for another 60-day period upon each transfer. Petitioner Garrison Johnson ("Johnson"), an African-American, has been racially segregated in his cell assignments at least five times – once on arrival, and at least four more times upon transfer between CDC facilities.[1] The Ninth Circuit rejected Johnson's claim that this CDC policy has violated his right to equal protection under the Fourteenth Amendment.

In upholding the CDC's racial segregation policy, the Ninth Circuit refused to follow this Court's holding in *Lee v. Washington*, 390 U.S. 333 (1968), that racial segregation in prisons is unlawful, and declined to subject the CDC's policy to strict scrutiny despite this Court's consistent application of such scrutiny to all state actions discriminating on the basis of race. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond*

1. Given that Johnson already has been transferred four times in 17 years, it is highly likely he will be transferred again, and subjected again to the admittedly segregationist policy, in the eight-plus years remaining in his sentence of 25 years to life.

v. J.A. Croson Co., 488 U.S. 469 (1989); *Korematsu v. United States*, 323 U.S. 214 (1944).

Instead, the Ninth Circuit applied a standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), which evaluated whether certain prison regulations having nothing to do with race were "reasonably related to legitimate penological interests." Pet. App. 12a-13a. Noting that the standard of review in this case is "paramount" – that is, outcome-determinative – the Ninth Circuit nonetheless declined to apply the strict scrutiny previously accorded all governmental racial classifications and then upheld California's race-based assignment policy. Pet. App. 11a-13a.

A. The CDC's Policy of Routine Racial Segregation

For more than 25 years, the CDC has segregated prisoners by race when assigning them to double-cell housing upon their arrival at prison, and again upon transfer to another prison. J.A. 182a-183a, 185a [Deposition of Linda L. Schulteis ("Schulteis Depo.")]; J.A. 197a-198a, 203a [Deposition of Steven Cambra ("Cambra Depo.")]; J.A. 302a-307a [Declaration of S. Cambra ("Cambra Decl."), ¶¶ 8, 10, 12]; J.A. 308a-312a [Declaration of L. Schulteis ("Schulteis Decl."), ¶ 5]. Arriving inmates are immediately classified by the CDC as "black, white, Asian, and other." Pet. App. 3a. Prisoners are placed into cells with other prisoners of their same "ethnic race." J.A. 213a (¶ 18); 249a (¶ 5); Opposition to Petition for Certiorari at 2.

Race is concededly the decisive factor in determining with whom new inmates will be housed. J.A. 182a-183a, 185a, 197a-198a, 203a, 302a-307a (¶¶ 8, 10, 12), 308a-312a (¶ 5). In making cell assignments, the CDC uses a form

(CDC-135) that provides only three pieces of information: Name/Number, Security/Custody Level, and Ethnicity/Race. J.A. 207a. The CDC "use[s] . . . race as *the* predominant factor" to determine double-cell housing assignments in the reception center. Pet. App. 20a (emphasis added); *see also* Pet. App. 3a.

B. Garrison Johnson's Experience of Racial Segregation in CDC Facilities

Johnson has been incarcerated in CDC institutions since 1987 when he was convicted of murder. J.A. 255a-256a. When Johnson first arrived at a CDC institution, CDC personnel told him that he had to be placed in a "black cell." J.A. 174a. The CDC has transferred Johnson at least four times during his tenure in the California prison system. J.A. 80a-82a. Each time, he was placed in a cell with another African-American. J.A. 173a-177a. In his more than 15 years of observing CDC practices, Johnson has noted that every arriving prisoner has been placed in a cell with a prisoner of the same race. J.A. 178a.

C. Garrison Johnson's Equal Protection Claims and the First Appeal Addressing His Complaint

Having suffered the humiliation of forced racial segregation multiple times, Johnson filed a complaint in federal district court on February 24, 1995, in *pro per*, alleging that the CDC's policy violated his right to equal protection under the Fourteenth Amendment. J.A. 15a. Nearly three years later, on January 8, 1998, the United States District Court for the Central District of California dismissed

Johnson's Third Amended Complaint without leave to amend. J.A. 26a.

On March 21, 2000, the United States Court of Appeals for the Ninth Circuit reversed in part and remanded, holding that Johnson's allegations were sufficient to state a claim for racial discrimination in violation of the Fourteenth Amendment. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000). J.A. 158a-168a.

D. The District Court Proceedings

On remand, the district court appointed counsel for Johnson and granted leave to file a Fourth Amended Complaint, in which Johnson sought monetary damages and injunctive relief. J.A. 28a-29a; 45a-55a. Discovery was conducted, and all parties sought summary judgment on the equal protection claims. J.A. 130a-277a.

In moving for summary judgment, the CDC contended that security concerns related to *possible* violence among inmates have necessitated its 25-year segregationist policy. J.A. 302a-312a [Schulteis Decl. ¶¶ 5, 10, 11; Cambra Decl. ¶¶ 13-14]. In support of its policy, however, the CDC offered no evidence, because it had none, of violence, security breaches, or disorder resulting from integration of two-person cells. Instead, the CDC stated a belief that "race is very important to inmates and . . . plays a significant role in antisocial behavior" (J.A. 302a-307a [Cambra Decl. ¶ 9]), but offered no data, surveys, academic literature, or other evidence demonstrating that its belief justifies racial segregation. Rather, the CDC relied on subjective fears of racial violence and generalized accounts of conflicts at Pelican Bay, a unique facility housing notoriously violent

convicts, where Johnson has never resided.[2] The CDC made no attempt in any of their summary judgment papers to establish a connection between housing assignments and the outbreak of violence.[3]

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2. The Security Housing Unit of Pelican Bay, commonly referred to as the "SHU,"

> has gained a well-deserved reputation as a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system. . . . [A]ssignment to the SHU is not based on the inmate's underlying offense; rather, SHU cells are reserved for those inmates in the California prison system who become affiliated with a prison gang or commit serious disciplinary infractions once in prison. They represent . . . "the worst of the worst."

Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995). The CDC admits that the Pelican Bay facility was specifically designed to house notoriously violent male convicts. [Cambra Depo., 17:17-19, attached as Exhibit 1 to Defendants' Response to Plaintiff's "Statement of Uncontroverted Fact [sic] and Conclusions of Law" ("[A]t Pelican Bay, we have some of the most violent men in the – in the California prison system. . . .").]

3. Nor did the CDC address the potential that integrated housing assignments of incoming prisoners might even help to avoid the outbreak of racial violence. *See* Larry Meachum, *Prisons: Breeding Grounds for Hate?*, Corrections Today, Dec. 2000, at 130. Corrections officials and hate crimes experts participating in a roundtable in 1999, hosted by the United States Department of Justice Office of Justice Programs and the Corrections Program Office, agreed that in order to prevent prisons from catalyzing racial hatred, "[p]rinciples of acceptance and tolerance should be integrated into existing programs and population management practices;" that prison "administrators must be deliberate about strategies to promote diversity in housing . . . ;" and that allowing even natural social self-segregation to occur may unnecessarily allow racial prejudice to flourish. *Id.* at 131-32.

The testimony of the CDC's own prison officials demonstrated that the CDC segregation policy rests on anecdotally-based assumptions that inmates of one race will always tend to be violent toward inmates of other races rather than any quantitative data or other specific information. The entirety of the evidence relied upon by the CDC consisted of: (a) four declarations, totaling 28 pages, describing and attempting to justify the CDC's segregated housing policy;[4] (b) short excerpts from the depositions of two of the declarants providing similar opinion testimony (J.A. 313a-316a; Cambra Depo. excerpts attached as Exhibit 1 to Defendants' Response to Plaintiff's "Statement of Uncontroverted Fact [sic] and Conclusions of Law"); and (c) 14 pages of testimony from Johnson's deposition (J.A. 211a, 216a-217a). The CDC presented no empirical studies, no guidelines or regulations from the Federal Bureau of Prisons or any correctional association, no expert testimony, and no policies or practices from any other state that

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4. The CDC provided declarations from Steven Cambra, at the time the Acting Director of the CDC ("Cambra") (J.A. 302a-307a), and Linda Schulteis, the Associate Warden of California State Prison – Lancaster ("Schulteis") (J.A. 308a-312a). As Acting Director of the CDC, Cambra oversaw all of the California prisons and was familiar with the CDC's policies regarding housing decisions. J.A. 302a-303a. Schulteis, who at the time of her deposition had been employed with the CDC for 24 years, testified on behalf of CDC as the person most knowledgeable at the Lancaster facility (where Johnson resided at the time) regarding cell housing assignment policies and procedures. J.A. 181a-195a. A third declaration was supplied by Barry O'Neill, at the time the Associate Warden at Pelican Bay State Prison. J.A. 296a-301a. The fourth declaration was submitted by counsel of record for the CDC, Deputy Attorney General Sara Turner, to introduce and authenticate certain documents. J.A. 253a-254a.

demonstrate racial segregation of newly arriving prisoners for two months is necessary or even helpful in averting prison violence.[5]

The support the CDC offered to justify its policy was conclusory and merely anecdotal, relying on "feelings" and "beliefs":

> [A]s to the initial housing assignment, if we were not to consider race and gang affiliation in the initial double-cell housing decision, I am certain that there will be conflicts both in the cells and the conflict will flow onto the yards. . . . [I]f we were to disregard the initial housing placement being done [by housing an inmate with another inmate of his same ethnic race], then I am certain there would be serious violence among inmates.

J.A. 308a-312a (Schulteis Decl. ¶¶ 10, 11). As Cambra

5. The few studies that do exist have demonstrated that the rate of violence among inmates segregated by race in double cells *surpasses* the rate of violence among inmates who are racially integrated. *See, e.g.*, Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 Law Soc'y Rev. 743, 769 (2002) (study of the Texas prison system in the aftermath of federal court intervention requiring desegregation of two-man cells, which "found that equal status contact via desegregation did *not* result in more violence compared to violence among inmates who were segregated" and that "the rate of racially motivated assaults among integrated cell partners decreased as integration increased") (emphasis added); Martha L. Henderson, et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295, 304 (2000). *See* discussion *infra* p. 36.

similarly stated in his declaration:

> If race were to be disregarded entirely, . . . I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. *I believe* there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, *I do not feel* that prison housing staff are adequately able to deal with the problems that *could* arise. . . . Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, *I believe* that the same problems *could* and will surface inside of the individual cells.

J.A. 302a-307a (Cambra Decl. ¶¶ 13-14) (emphasis added). Among other obvious deficiencies, the declarations did not even attempt to justify the application of the segregationist policy to prisoners more than once, *i.e.*, when they have already been observed by CDC personnel for an initial 60-day period and are later moved from one institution to another.

On June 11, 2001, the district court denied the summary judgment motions. J.A. 420a-425a. After this Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), however, respondents Rowland and Gomez successfully moved for reconsideration of the denial of their motion for summary judgment based on qualified immunity. Pet. App. 7a. Johnson appealed. J.A. 40a.

E. The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals affirmed the district court on different grounds, holding that the CDC's automatic racial segregation policy is entitled to a *presumption* of constitutionality and that Johnson had not rebutted that presumption. Pet. App. 31a.

The panel concluded that the standard of scrutiny would be determinative, perceiving that the justification proffered by California was far too slim to prevail if the policy were subjected to strict scrutiny. Pet. App. 11a. Notwithstanding *Lee v. Washington*, 390 U.S. 333 (1968), and the Supreme Court's repeated holdings that *all* state racial classifications are presumptively unlawful and may be upheld, if at all, *only* if able to withstand strict scrutiny, the Ninth Circuit carved out a wholesale "prison exception." It held that the more relaxed review of *Turner v. Safley*, 482 U.S. 78 (1987), should be applied to any intentional racial segregation undertaken by prison administrators. The court upheld California's policy on that relaxed review, concluding that Johnson had not met his burden of refuting a "common-sense connection" between the government's objective and the CDC's racial segregation policy. Pet. App. 19a, 21a. According to the Ninth Circuit panel, in order to prevail, Johnson would have to offer evidence showing that, in the absence of the CDC's racial segregation policy, racial violence would *not* increase. *Id.*

F. The Ninth Circuit's Denial of Rehearing and the Dissent

Johnson petitioned unsuccessfully for rehearing with a suggestion for rehearing en banc. Pet. App. 36a-37a. Four judges dissented from the denial of rehearing. Pet. App. 38a-50a. The dissenting judges argued that this Court has not overruled *Lee*, and distinguished *Turner* because it was not a case involving racial segregation:

> "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Pet. App. 41a n.1 (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). The dissent also noted that "[b]oth the Fifth and Seventh Circuits have refused to accord such extreme deference [to racial segregation by prison administrators], recognizing that, in the context of race, more must be required." Pet. App. 44a. The dissenting judges found *Lee* controlling, especially in light of this Court's recent and repeated command that lower courts apply strict scrutiny to *all* race-based classifications. Pet. App. 38a-42a, 50a.

SUMMARY OF THE ARGUMENT

Thirty-six years ago, this Court held in *Lee* that racial segregation which is constitutionally prohibited outside of prisons is equally prohibited inside prison walls. The Court's opinion affirmed, and found "unexceptionable," the decision of a three-judge court that rejected an argument essentially indistinguishable from that advanced by California here, namely that "the practice of racial segregation in penal facilities is a matter of routine prison security and discipline." *Lee* requires application of strict scrutiny and the reversal of the Ninth Circuit's judgment that California's routine

segregation of prisoners by race and ethnicity is not subject to strict scrutiny and does not violate the Equal Protection Clause.

This Court has repeatedly held, and repeated unanimously just last year, that *every* governmental use of race to classify individuals or assign them benefits or burdens is subject to strict scrutiny and is permissible only if the government proves its use of race necessary and narrowly tailored to advance compelling governmental objectives. California's policy, by which all initial cell assignments – on arrival and on every subsequent transfer – are determined by race or ethnicity, is subject to that rule. This is so regardless of the professed motivation (protection of inmates against violence) that underlies the policy.

The Ninth Circuit erred in disregarding *Lee* and concluding that it was overruled *sub silentio* by *Turner*. The holdings that all governmental segregation and racial classification is permissible, if at all, only upon strict scrutiny, are more recent, more carefully considered, more relevant (reached as they were in cases involving racial discrimination), and more fundamental than the dicta cited from *Turner* and its progeny. The *Turner* standard was not formulated in a case involving intentional racial discrimination, and has never been applied by this Court in any case involving racial discrimination. The same reasons that have led the Court to apply Eighth Amendment review (rather than *Turner* review) to claims alleging violation of Eighth Amendment rights also require application of Fourteenth Amendment strict scrutiny to the intentional racial segregation of prisoners. Further, the policy reasons that underlie *Turner* – the need to preserve for prison administrators a full range of discretion to operate prisons

in the interests of community and prisoner safety – do not extend to cases challenging routine racial segregation, because prison administrators do not need, and are ordinarily not supposed to have, the discretion to engage in racial segregation. To put it another way, under the Fourteenth Amendment, racial discrimination generally, and racial segregation in particular, are not "tools" that prison administrators should routinely use to protect prisoners and the public. *Point I.*

Under the strict scrutiny required by *Lee* and all other cases examining government racial classifications from *Brown v. Board of Education*, 347 U.S. 483 (1954), to *Grutter v. Bollinger*, 539 U.S. 306 (2003), the CDC's routine, automatic, and unexamined segregation policy is invalid.

Assuming *arguendo* that routine racial segregation ever could be justified for long-term prison management – as distinct from its imposition in connection with some specific event such as a post-race-riot emergency – respondents utterly failed to provide the kind of proof necessary to survive strict scrutiny. The CDC pointed to no particularized circumstances requiring the permanent enshrinement of its racial segregation policy; adduced no empirical data or statistical analyses to support the notion that housing together members of different races will always and necessarily lead to violence; and presented no expert testimony or other evidence establishing that its policy was necessary and narrowly tailored to advance compelling state interests. The policy has continued through bureaucratic inertia for twenty-five years without ever being given a hard look. The CDC rested its justification exclusively on anecdotal beliefs and the "feelings" of a handful of administrators, which lack any support and have never been tested or subjected to careful review.

The justification it advanced was no more specific or sound than the justifications advanced in this Court, always unsuccessfully, for numerous "Jim Crow" laws, including those restricting integration in housing, on buses, on golf courses, in restaurants, and in courtrooms. The state's reliance on race or ethnicity categorically, rather than as part of an individualized assessment of each inmate's particular history of racial animosity and pattern of racial violence, violates the Equal Protection Clause. *Compare Grutter*, 539 U.S. 306, *with Gratz*, 539 U.S. 244. *Point IIA*.

The CDC's policy would be invalid even if the more relaxed standard of *Turner* applied. The policy rests on premises (that inmates of different backgrounds will tend to be violent with one another, and that segregated cells will tend to reduce prison violence) that lack any rational support; it causes precisely the full harm that the Equal Protection Clause was intended to eliminate; it is not justifiable as conserving scarce administrative or economic resources; and there are ready alternatives that fully accommodate the state's interests while affording inmates the equal protection and elimination of state-imposed segregation that the Constitution guarantees. Prison officials do not need discretion to routinely segregate prisoners by race and ethnicity. They are required to run prisons, while protecting the public and inmates alike, by means other than routine racial segregation. *Point IIB*.

ARGUMENT

I. RACE-BASED PRISON CELL ASSIGNMENTS, LIKE ALL OTHER RACE-BASED GOVERNMENT CLASSIFICATIONS, ARE SUBJECT TO STRICT SCRUTINY

A. This Court Has Repeatedly Held That All Government Race-Based Classifications Are Invalid Unless They Survive the Court's Most Rigid Scrutiny

Over the last 60 years, this Court has consistently held that government racial classifications must be strictly scrutinized to determine whether such classifications are permissible under the Fourteenth Amendment. The Ninth Circuit's refusal to apply that settled rule, and decision to apply instead the more relaxed standard provided in *Turner*, is grave error, mandating reversal.

The Court recently reaffirmed its deeply rooted holding that "*all* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270 ("It is by now well established that '*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.'") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)) (emphasis added). Although the Court split over the constitutionality of the admissions policies at issue, *all nine Justices were in agreement that strict scrutiny applies whenever the government classifies based on race*. *Grutter*, 539 U.S. at 326 (O'Connor, J., for the Court, joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) ("We apply strict scrutiny to all racial classifications. . . ."); *id.* at 378

(Rehnquist, C.J., dissenting, joined by Scalia, J., Kennedy, J., and Thomas, J.) ("[I]n the limited circumstance when drawing racial distinctions is permissible, the government must ensure that its means are narrowly tailored to achieve a compelling state interest.") (citation and internal quotation omitted); *id.* at 388 (Kennedy, J., dissenting) (relying on the Court's repeated reaffirmation of "the absolute necessity of strict scrutiny when the state uses race as an operative category").

The unanimous holding last year in *Grutter* by every current member of this Court that *every* governmental intentional classification on the basis of race be justified, if at all, on a showing by the government that the practice is necessary and narrowly tailored to serve compelling governmental ends, was not novel. It reflected the Court's longstanding understanding of constitutional imperative. Enforcement of the equal protection guarantees requires strict scrutiny for *all* rules classifying by race, and this has been the Court's view for decades prior to *Grutter* and *Gratz*. *See Adarand*, 515 U.S. 200; *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944). The Court has consistently held that strict scrutiny is required for governmental racial classification "regardless of the government's purported reason for using race and regardless of the setting in which race was being used." *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.).[6]

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6 . It was uncertain, for a time, whether that same rule applied to remedial classifications – those intended to remedy the effects of prior state segregation. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); (Cont'd)

The unwavering application of strict scrutiny to governmental racial or ethnic classifications derives from the Fourteenth Amendment's history and core purposes. Shortly after it recognized in *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," the Court first decided that the Equal Protection Clause demands that racial classifications be subjected to "the most rigid scrutiny." *Korematsu*, 323 U.S. at 216. The Court held that if racial classifications are to be sustained, they must be shown to be necessary to the accomplishment of a compelling or overriding state objective. *Id.* at 216; *see also Adarand*, 515 U.S. at 223-24 ("[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized," and "*any* preference based on racial or ethnic criteria must necessarily receive the most searching examination.") (emphasis added, citations omitted).

Strict scrutiny is no less required in the face of odious government racial distinctions made among prisoners. As Justice Scalia has written:

> The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly

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(Cont'd)
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). More recent decisions of this Court dispelled that uncertainty. *See Adarand*, 515 U.S. 200; *Grutter*, 539 U.S. 306.

> benign purposes we have repeatedly rejected. *See, e. g., Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict).

Croson, 488 U.S. at 520 (Scalia, J., concurring in judgment) (citations omitted).

Strict scrutiny applies to review all claims challenging intentional governmental racial discrimination for three reasons. First, only a narrow tailoring requirement can "ensure that 'the means chosen "fit" . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 331 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)) (alteration in original). This first rationale serves a "core purpose of the Fourteenth Amendment," that is "to do away with all governmentally imposed discrimination based on race." *Grutter*, 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

Second, racial classifications threaten to cause stigmatic harm, to promote notions of racial inferiority, and to *incite* racial hostility. *Croson*, 488 U.S. at 494 (plurality opinion). Never has the Court accepted the contention that the government can constitutionally resort to racial segregation or classification to quell racial hostility. "The Constitution cannot control [individual] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433; *see also Buchanan v. Warley*, 245 U.S. 60, 81 (1917) ("It is urged that this proposed segregation will promote the public peace by preventing race

conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."). Race-based government classification is presumptively unlawful and invariably subject to strict scrutiny even if applied equally. *Loving*, 388 U.S. at 9; *Brown*, 347 U.S. 483.

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal decree.

Powers v. Ohio, 499 U.S. 400, 410 (1991) (parallel citations omitted).

Third, the bloody history that resulted in the Fourteenth Amendment's goal of a colorblind society demands a higher threshold of proof for *any* governmental racial classification. The forced separation of citizens based on race is odious to this equal protection principle.

> [T]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.

Grutter, 539 U.S. at 353 (Thomas, J., dissenting). *See also Croson*, 488 U.S. at 518 ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.") (Kennedy, J., concurring); *id.* at 520 (Scalia, J., concurring in judgment). To permit review of any racial classification without strict scrutiny would "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

For these reasons, a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (citation and internal quotation omitted) (applying strict scrutiny to racial gerrymanders).

B. *Lee v. Washington* Demands That Courts Strictly Scrutinize Prison-Based Racial Equal Protection Claims

The appropriate standard of review here is mandated not only by the repeated holdings in *Grutter* and its predecessors, but also by the specific holding in *Lee*, where the Court affirmed that racial segregation of prison inmates violates the Fourteenth Amendment and is presumed invalid unless it survives strict scrutiny. 390 U.S. 333. "[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the *necessities* of prison security and discipline.'" *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (citing *Lee*, 390 U.S. at 334) (emphasis added).

Like many of the decisions applying *Brown's* invalidation of separate but equal, the Court's decision in *Lee* was a

short *per curiam* opinion, recognizing the simple proposition that state statutes imposing racial segregation in prisons violate the Fourteenth Amendment.[7] Affirming the desegregation decree of the court below, the Court found it "unexceptionable." 390 U.S. at 334. The argument advanced by Alabama to justify its policies which the lower court categorically rejected was, as described, virtually identical to the argument modeled on *Turner* made by California here (and accepted by the Ninth Circuit): "The only defense offered to the contention that the statutes involved herein . . . violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1968) (three-judge court). The judgment affirmed by the Supreme Court rejected an attempt to subject governmental racial discrimination in prisons to lesser scrutiny than is applied to such discrimination elsewhere, noting that "the case was governed by *Brown v. Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, [which made] unmistakably clear that racial discrimination by

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7. *See, e.g., Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (public transportation); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (athletic contests); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (airport restaurants); *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtroom seating); *Schiro v. Bynum*, 375 U.S. 395 (1964) (municipal auditoriums).

governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. at 331. The three-judge court added that it could

> conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Id. at 331-32.

The references to *Lee*, 390 U.S. 333, in subsequent opinions suggest without exception that it remains very good law, and do not suggest any overruling of its holding that strict scrutiny, rather than any special exception to it for prisons generally, is the constitutionally mandated standard that must be applied to all prison racial classifications. For example, in *Hudson v. Palmer*, 468 U.S. 517, 523 (1984), the Court cited and quoted *Lee* for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to 'prison security and discipline.'"

The Court cited *Lee* again in *Turner*, 482 U.S. at 84, as authority for the point that inmates retain constitutional protections in prison, including protection from race discrimination. The Court did not suggest in any way that the application of strict scrutiny to a race-based equal protection claim in *Lee* had been called into question.

Justice Scalia's 1989 concurrence in *Croson* cited *Lee* in the course of recognizing that only "a social emergency" imminently threatening "life and limb" could justify limited racial segregation of inmates. *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in judgment). Last year, after first explaining that "pressing public necessity" is synonymous with "compelling governmental interest" under the strict scrutiny standard, Justice Thomas cited *Lee* for the holding that prison racial segregation can be justified, if at all, only if it survives strict scrutiny:

> I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." *Cf. Lee v. Washington*, 390 U. S. 333, 334 (1968) (*per curiam*) (Black, J., concurring) (indicating that protecting prisoners from violence *might* justify *narrowly tailored* racial discrimination) . . . .

Grutter, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (parallel citations omitted) (emphasis added).

The holding of *Lee*, in common with the holding of post-*Brown* cases generally, is plain: the cell-segregation policy challenged here is presumptively unlawful and may

be upheld, if at all, only if the state has carried its burden of proving that policy necessary and narrowly tailored to advance compelling governmental purposes. *Shaw v. Reno*, 509 U.S. at 643-44; *Lee*, 390 U.S. 333.[8]

C. *Turner v. Safley* Created No Exception to *Lee v. Washington* or the Unitary Standard of Review Mandated by the Court's Other Racial Equal Protection Holdings

In neither *Turner* nor its progeny has this Court departed from its unbroken line of precedents applying strict scrutiny to intentional governmental racial segregation.

1. In *Turner*, the Court considered an inmate class action challenging state prison regulations that restricted

8. Numerous lower courts applying *Lee* both before and after *Turner* have strictly scrutinized prison racial segregation policies and practices, invalidating them unless prison officials provide a compelling and narrowly tailored justification for their racial classifications. *See, e.g., Sockwell v. Phelps*, 20 F. 3d 187 (5th Cir. 1994) (strict scrutiny applied under *Lee* to invalidate Texas prison racial segregation); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987) (strict scrutiny invoked to reverse summary judgment on prisoner's race discrimination claim); *United States v. Wyandotte County*, 480 F.2d 969 (10th Cir. 1973) (a vague fear of racial violence was insufficient to justify a racial segregation policy); *Blevins v. Brew*, 593 F. Supp. 245 (W.D. Wisc. 1984) (under *Lee*, to justify *even temporary initial racial segregation for one night*, officials must show the practice is necessitated by extreme or exigent circumstances involving racial conflict); *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979) (*vague fear* that integration will result in violence held insufficient to justify segregation); *McClelland v. Sigler*, 327 F. Supp. 829 (D. Neb. 1971) (the argument that integration would endanger internal prison security did not justify racial segregation); *but see, Morrison v. Garraghty*, 239 F.3d 648, 655 (4th Cir. 2001); *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993).

correspondence between inmates and restricted inmate marriage. 482 U.S. at 81. Before addressing the inmates' specific First Amendment and Fourteenth Amendment due process claims, the Court articulated a standard of review for those claims that would be responsive to two relevant principles. *Id.* at 85. On the one hand, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* at 84. Because prison inmates remain protected by the Constitution, "federal courts must take cognizance of valid constitutional claims of prison inmates." *Id.* The Court cited *Lee* among other cases in support of the principle that prisoners retain constitutional rights. On the other hand, separation of powers and federalism counsel deference to state prison authorities, who are better equipped than federal courts to deal with the problems of prison administration or reform. Because certain "complex and intractable" problems that bedevil America's prisons are "not readily susceptible of resolution by decree[,]" the "expertise, planning, and the commitment of resources" necessary to run a prison "are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85.

Consistent with these principles, the Court formulated a standard of review based on four of the Court's prior prisoners' rights decisions which, like *Turner*, did not involve any claimed violation of the right to racial equal protection.[9] The Court did not cite *Lee* or any cases involving equal protection, race, or any other suspect classifications as a basis

9. *See Turner*, 482 U.S. at 86-87 (citing *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977); and *Pell v. Procuinier*, 417 U.S. 817 (1974)).

for the "reasonably related to legitimate penological interests" standard it adopted. *Turner*, 482 U.S. at 84.[10]

The Court has since applied the *Turner* standard to inmate challenges to prison regulations that arguably impinged on First Amendment rights of free association, free speech, and free exercise, the right to substantive due process under the Fourteenth Amendment, and the constitutional right to access the courts.[11] Moreover, it has written, in dicta, that

10. *Turner* summarizes the standard as follows: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests [and is not] an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 89, 90. *Turner* identifies four factors that should be considered under this standard: (1) whether there is a valid, rational connection between the prison regulation and a neutral, legitimate government interest put forward to justify it; (2) whether alternative means of exercising the asserted constitutional right remain open to the inmate; (3) whether and to what extent accommodation of the asserted right will have an impact on prison personnel, inmates, and the allocation of prison resources; and (4) whether a ready alternative to the challenged practice exists that will fully accommodate the prisoners' interest at *de minimis* cost to valid penological interests. *Id.* at 89-91.

11. *Overton v. Bazetta*, 539 U.S. 126 (2003) (upholding a prison system's limitations on non-contact visits regardless of whether a right to association survived incarceration); *Shaw v. Murphy*, 532 U.S. 223 (2001) (prisoners have no First Amendment right to provide legal assistance to others); *Lewis v. Casey*, 518 U.S. 343 (1996) (lower court failed to accord sufficient deference to prison restrictions on inmates' access to law libraries); *Washington v. Harper*, 494 U.S. 210 (1990) (upholding administration of anti-psychotic drugs to inmates against their will); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (prison regulations governing what publications inmates (Cont'd)

the *Turner* standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 223-24 (1990); *see also Shaw v. Murphy*, 532 U.S. 223, 229 (2001). But the Court has never applied *Turner* in a case involving equal protection of suspect classes, much less held that the more relaxed standard of review applied in *Turner* – rather than the strict scrutiny accorded to racial equal protection claims under *Lee* and the Court's subsequent cases – applies to allegations that prison officials segregate or otherwise classify prisoners by race.

2. Notwithstanding *Lee* and the subsequent repeated holdings (by every member of the present Court, and as recently as June 2003) that *all* governmental racial classifications require strict scrutiny, the Ninth Circuit refused to subject California's policy to that demanding standard. In substituting the relaxed review of *Turner*, it erred, for *Turner* and its progeny[12] neither overturned *Lee* nor created a prison exception to strict scrutiny for governmental racial discrimination. At least five considerations support the conclusion that the rule of *Lee*, *Croson*, and *Grutter* – not *Turner* – governs this case.

(Cont'd)
may receive must be reasonably related to legitimate penological interests); *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (a prison regulation that impinges upon inmates' free exercise rights is constitutionally valid if it is reasonably related to legitimate penological interests); *Vester v. Rogers*, 482 U.S. 916 (1987) (denying review of challenge to restriction on prisoner-to-prisoner correspondence with citation to *Turner*).

12. *Shaw v. Murphy*, 532 U.S. 223; *Washington*, 494 U.S. 210; *O'Lone*, 482 U.S. 342.

First, the present case is squarely governed by a specific decision of this Court which has not been overruled. *Lee* was decided under the rule of strict scrutiny applied in *Brown* and its progeny. *Lee* rejected a position advanced by Alabama that would have created a prison exception to the strict scrutiny otherwise governing all intentional governmental racial segregation.[13] But Alabama's archaic position – rejected in *Lee* – would have to be embraced here if *Turner* were applied to governmental action involving racial discrimination. The case is therefore governed by precedent, *see Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55, 862-84 (1992), and by the rule that the Court's prior decisions are not subject to overruling by implication. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).[14]

Second, the *Croson-Grutter* rule was formulated in cases involving racial discrimination – the very issue presented here. The reference to *Lee* in both *Croson* and *Grutter* makes plain that racial classifications in prison are included in the class of "all racial classifications" that are subject to strict scrutiny. By contrast, the *Turner* standard was formulated in a case not involving racial discrimination, and has never been applied in a racial classification case by this Court.

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13. In the Brief for Appellants, filed by Alabama with this Court in *Lee*, the state unsuccessfully argued that "[t]he same rules relating to race which have been judicially applied since 1954 to public parks, schools and similar public facilities are not applicable to and should not be applied to prisons and jails." Brief for Appellants at 10, *Lee*, 390 U.S. 333 (No. 75).

14. *Lee* was not a summary affirmance. It was subject to oral argument; thereafter, the Court issued a *per curiam* opinion, and three justices wrote a concurring opinion.

Third, if there is any conflict between the broad, categorical rule stated in *Grutter* and its predecessors (for racial discrimination) and the rule stated in *Turner* and its progeny (for prison regulations), the *Grutter* rule is more fundamental and specifically applicable. Strict scrutiny for all racial classifications is rooted in the history of slavery, the Civil War amendments and the constitutional commitment to achieving a colorblind society. Strict scrutiny of government racial classifications has been repeatedly and carefully considered by this Court; has been reiterated more recently than has the *Turner* rule; and is demonstrably correct as stated. The dicta in *Turner*, and repeated subsequently, suggesting a general application of its holding to prison cases, does not apply to rules segregating prisoners by race or "ethnic race" (the term used by the CDC [Opposition to Petition for Writ of Certiorari at 2]), just as it does not apply to cruel or unusual punishment meted out by prison officers.

That *Turner's* dicta does not trump settled holdings in other areas is shown by the Court's subsequent Eighth Amendment jurisprudence. Claims under the Eighth Amendment that prisoners have been subject to cruel or unusual punishment are subject to the Eighth Amendment's own *sui generis* standard, not the broadly deferential *Turner* rule. *See Nelson v. Campbell*, No. 03-6821, 2004 U.S. Lexis 3680, *14-15 (May 24, 2004) (analyzing prisoner's claim that his constitutional rights were impinged with no reference to *Turner*); *Hudson v. McMillian*, 503 U.S. 1 (1992) (same); *Wilson v. Seiter*, 501 U.S. 294 (1991) (same); *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979) (Kennedy, J.) ("The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the

context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary."). Claims involving intentional racial segregation are equally subject to the Equal Protection Clause's controlling standard of review, and deference to the beliefs of the CDC in this context would similarly reduce the protections of the Fourteenth Amendment to a nullity.[15]

Fourth, this Court has expressly rejected the argument that government representatives – whether in the legislative or executive branch of local, state, or federal government – are entitled to judicial deference when racial classifications are involved. *Adarand*, 515 U.S. at 235-36.[16] Even Congress is not entitled to deference that would permit the Court to

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15. When the government brings an enforcement action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the question whether the state program discriminates on the basis of race is subject to strict scrutiny. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978); *see also Gratz*, 539 U.S. at 276 n.23. It is therefore inconceivable that the same question, when examined in the context of a suit brought under the Equal Protection Clause by the victim of such discrimination, would be subject to some more relaxed standard.

16. This argument was also made, and rejected, in *Lee*, wherein the state of Alabama unsuccessfully argued in its reply brief that

> [w]e have in this case an illustration of a legitimate area for the exercise of administrative discretion. It would be wrong, and even dangerous, for this court to upset the time honored, judicially recognized, principle permitting wide administrative discretion in an effort to stop one alleged invidious practice, particularly when you can insure the end of that alleged practice by a simple and clear declaration of the law.

Appellants' Reply Brief at 2, *Lee*, 390 U.S. 333 (No. 75).

use a relaxed standard of scrutiny when reviewing assertedly benign classifications based on race or ethnicity. *Id.* at 223-24, *rev'g*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The legislative and executive branches may be generally better equipped than the judiciary to determine how to manage prisons with respect to the vast generality of prison rules or prison administrator conduct, but the judiciary is best suited to evaluate racial protection claims and to scrutinize carefully any claimed necessity to segregate prisoners by race. *Croson*, 488 U.S. at 490-91 (plurality opinion); *see Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227-30.

Finally, the *Turner* rationale does not reach, and has no logical application to, official, regularized state-sanctioned racial segregation or other discrimination. Rooted as it is in the recognition that prison administration is difficult and within the peculiar province of prison officials (*see Turner*, 482 U.S. at 85), *Turner* neither afforded nor was intended to foster or protect the discretion to treat prisoners differently because of their race or ethnic background. Under the law, prison administrators must first find ways *other than racial classifications* to advance compelling state interests. "[O]nly a social emergency rising to the level of imminent danger to life and limb – for example, a prison race riot, requiring temporary segregation of inmates, *cf. Lee v. Washington*, *supra* – can justify an exception to the principle . . . that our Constitution is colorblind." *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in judgment) (citation and internal quotation omitted).

Freedom from racial segregation is qualitatively different from the rights to which the Court has applied *Turner*. *See supra* note 11. The right to freedom from racial

segregation implicates not only all the historic concerns inherent in the Court's racial protection jurisprudence, but also the very legitimacy of the penal system, an institution which was "founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Given the significant societal harms posed by the threat of government-created racial classifications, and the rare and highly unusual circumstances in which segregating prisoners by race might ever be temporarily necessary, strict scrutiny is necessary to determine whether the CDC is using race illegitimately, unnecessarily classifying and segregating prisoners by race when compelling governmental goals can be advanced just as well, and almost certainly far better, by colorblind means.

II. THE CDC'S POLICY OF SEGREGATING ALL ARRIVING INMATES BY RACE AND ETHNICITY VIOLATES THE EQUAL PROTECTION CLAUSE

The CDC presented *no* evidence that its policy of racially segregating two-man cells in *all* CDC facilities for *all* incoming inmates and *all* transferred inmates (regardless of, *inter alia*, the length of their tenure and prior conduct) is necessary to protect against inmate violence. Nor did the CDC present evidence that it had ever questioned, reviewed, or assessed the need for the policy during its 25-plus year history. The CDC offered no testimony or other evidence demonstrating that a mixed-race cell assignment had led to any violence at any CDC institution, at any time, much less that its policy is necessary and narrowly tailored to avert such violence. Nor did the CDC offer any expert testimony to support the notion that its policy of automatic segregation by race minimizes the risk of prison violence. A generalized fear of racial violence is the *only* basis on which the CDC's policy of racial segregation rests.

Whether the policy is subjected to strict scrutiny under *Lee*, or even the more relaxed standard employed in *Turner*, the CDC's automatic, blanket segregation policy does not withstand scrutiny under the Equal Protection Clause.

A. The CDC's Implementation of Racial Segregation Is Not Narrowly Tailored to Serve a Compelling State Interest, or *Any* Interest

Under standards advocated by Justices Scalia and Thomas, it is doubtful that the daily management of the California prison system – as distinct from some particular situation constituting an emergency – presents a sufficiently "compelling necessity" that might merit further analysis under strict scrutiny. *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment); *Grutter*, 539 U.S. at 352-53 (Thomas, J., concurring and dissenting). Even if the routine use of racially segregated cell assignments of all arriving prisoners for 60 days so as to minimize inmate violence to other inmates could present a "compelling governmental interest" in justifying routine racial segregation under a strict scrutiny analysis, the CDC entirely fails to meet its burden of showing that its policy is necessary to advance that interest or is narrowly tailored to do so.

The CDC's policy of routinely subjecting arriving inmates to racially segregated cells is the antithesis of *narrowly tailored*. It is an overbroad, blanket approach that has been mechanically applied for more than 25 years, and is applied today in the face of empirical data (*see supra* note 5) suggesting it is the wrong policy to address any need asserted by the CDC. No individualized consideration is given to assess whether the policy is necessary for each newly incarcerated prisoner. No individualized consideration is

given to assess whether segregation is necessary for each transferred prisoner. *Compare Grutter*, 539 U.S. at 333-34, *and Bakke*, 438 U.S. at 315-18 (consideration of race on an individualized basis, together with other factors, held permissible) *with Gratz*, 539 U.S. at 269-76 (holding unconstitutional the mechanical, un-individualized consideration of race).

Nor has the CDC proffered anything but *ipse dixit* to support its contention that such a blanket, arbitrary policy is necessary to prevent violence. The CDC has proffered nothing more than its untested *assumption* that all prisoners will be violent with other prisoners of a different race or national origin. *See supra* pp. 8-9, 13. The entire CDC record comprises the speculation of two CDC witnesses that they (and therefore by extension the CDC) are "*certain*" that "there will be conflicts" and "serious violence among inmates," and that "there will be conflicts both in the cells and the conflict will flow onto the yards," if race "were disregarded entirely." J.A. 308a-312a [Schulteis Decl. ¶¶ 10-11 (emphasis added)]; J.A. 302a-307a [Cambra Decl. ¶¶ 13-14]. Courts uniformly hold the kinds of unquantitative, conclusory assertions offered here insufficient to justify racial classification under strict scrutiny. *See, e.g.*, *Gratz*, 539 U.S. at 269-276; *Adarand*, 515 U.S. at 238; *Croson*, 488 U.S. at 498-506.[17]

17. The CDC's time-worn arguments of racial violence stemming from integration have been made repeatedly by segregationists, in several contexts, over the past century. When the Army began to desegregate its ranks in 1950, there were "general predictions of ruined efficiency, wrecked morale, even bloody revolt . . . ." Lee Nichols, *Breakthrough on the Color Front* 7 (1954). In addition to objections from the enlisted men, Army officials predicted serious trouble based on past experience with serious (Cont'd)

As noted by the four judges dissenting from the Ninth Circuit's denial of rehearing, "[t]he prison official affidavits . . . do not cite one concrete instance or statistical example of racial violence, instead referring only to the unsubstantiated 'beliefs' of prison officials about what they presume will happen." Pet. App. 43a n.3.

Moreover, carefully read, the depositions and declarations proffered by the CDC do not support its policy under the *Turner* factors, for they are curiously phrased to predict harm "if race were to be disregarded entirely." J.A. 302a-307a [Cambra Decl. ¶ 13]. But that is not the issue posed by Johnson's challenge to the CDC's policy. Race is at present the dominant factor; as the Ninth Circuit noted, "the chances of an inmate being assigned a cell mate of another race is '[p]retty close' to zero percent." Pet. App. 3a (alteration in original).[18] Accordingly, the question presented here is not whether race must be disregarded entirely, but whether it is constitutional for the state to effectively ignore or subordinate all other factors in favor of a single-minded

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racial disturbances, and even full-scale race riots. *Id.* at 58-59. The experience of the Army, however, once the desegregation process had actually begun was quite different, according to Nichols: "Detailed official analysis by statements of hundreds of field commanders, showed that racial conflict – once a critical military problem that led to repeated bloody riots, had all but vanished. With Negroes and whites no longer grouped separately, there was apparently little motive for racial 'gang' conflict." *Id.* at 7.

18. *See also* J.A. 183a [Schulteis Depo.] (Q: "Why as a practice do you put a black with a black and a white with a white? A: Or a Hispanic with a Hispanic? Q: Or a Hispanic with a Hispanic? A: My whole career we've done that. My whole entire 24 years with the department. It is what the department has done.").

consideration of race as the predominant factor governing initial 60-day placements. The declarations do not assert that there would be harm in the CDC's prisons if race were no longer the controlling, overwhelmingly dominating factor, only (in conclusory terms) that there would be harm if it were "disregarded entirely." Pet. App. 25a; J.A. 302a-307a [Cambra Decl. ¶ 13].

The few available published studies implicitly condemn the CDC's policy by demonstrating that the rate of violence between inmates segregated by race in double cells *surpasses* the rate of violence among inmates in cells that are racially integrated. *See supra* note 5; *cf.* Martha L. Henderson, et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295, 304 (2000) (in a 1997 nationwide survey, 88.5% of maximum-security wardens responding were of the opinion that integrated cells have a similar or lesser level of conflict than segregated cells).

The CDC's attempt to justify segregation based on its perception of typical beliefs, gang affiliations, hostilities and prejudices of the inmates falls far short of the kind of showing that could justify the policy on strict scrutiny. The CDC asserts that the reason arriving prisoners must be segregated by race is that "inmates believe race to be an important issue . . . [which] stems from the identification that prisoners, particularly male prisoners, make of themselves . . . [and] from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior." J.A. 302a-307a [Cambra Decl. ¶ 9]. But an assertion of that generality does not begin to justify routine 60-day racial segregation of all incoming inmates, regardless of their crimes or the

character of information already available to the CDC about any given inmate; it does not begin to justify the automatic assignment of Johnson, upon each of four transfers after years of observation by CDC personnel, to a racially segregated cell; and it does not explain why cell assignments that are deemed safe on day 61 are presumptively unsafe on day 59 (or day 30, or day 10); or why a prisoner who has been segregated for 2 months already and can therefore safely be celled with those of any "ethnic race" must be re-segregated for another two months merely because the CDC has decided for its own administrative convenience to transfer him to a different CDC institution.

That some inmates may indulge in race-based hatreds and stereotypes does not suggest that the CDC should condone or support such biases as a matter of policy and practice. *See, e.g.*, *Palmore*, 466 U.S. 429 (the state cannot justify removal of a child from its mother's custody based on effects of racial prejudice expected to result from mother's marriage to a man of a different race).

B. Because the CDC's Arbitrary Racial Segregation Is an Exaggerated Response to Unsubstantiated Fears, It Does Not Even Withstand Scrutiny Under *Turner*

Even assuming *arguendo* that *Turner* rather than *Lee* should be applied to the CDC's racial segregation policy, the Court's deference to prison administrators' judgment under that standard is not absolute, and the CDC's showing fails even that lesser scrutiny, properly applied. *Cf. Turner*, 482 U.S. at 100 (Stevens, J. concurring in part and dissenting in part) ("How a court describes its standard of review when a prison regulation infringes fundamental constitutional rights

often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation."); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[D]eference does not imply abandonment or abdication of judicial review.").

The CDC has failed to satisfy the first, and most important, prong of the *Turner* test – "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. The CDC failed to provide any evidence supporting a valid, logical connection between the CDC's racial segregation policy and the concededly legitimate penological interest of preserving prison security, and the Equal Protection Clause prevents the courts from presuming any such support. The CDC presented *no* documented cases of prison violence stemming from integration of a two-man cell, *no* empirical evidence of increased violence resulting from the integration of cells in other prison systems, and *no* expert testimony tending to support a heightened risk of violence or lack of discipline stemming from such integration. Indeed, as discussed above, the CDC offered nothing more than unsupported conjecture in support of its assertion that integration would lead to increased violence.[19] On the record in the district court

19 Compare *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (Posner, J.), in which a rule barring dreadlocks did not survive scrutiny under *Turner*.

> No evidence of . . . a danger [of racial conflict] was presented. . . . One prison administrator testified "that a person who is wearing the symbol of the dreadlock might indeed be wearing something as a symbol" that blacks

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(and here), the CDC's policy is nothing more than an "exaggerated response" to its subjective fears of racial violence. *Turner*, 482 U.S. at 87. Because the CDC's policy cannot satisfy the first and most important *Turner* factor, it should be invalidated "irrespective of whether the other [*Turner*] factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. at 229-30.

The CDC's automatic racial segregation policy fails the remaining *Turner* factors as well. First, the inmates do not have available alternative means to exercise the abridged constitutional right to be free from racial discrimination. The Ninth Circuit's finding that Johnson has a "reasonable alternative" to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time and because the practice is temporary (Pet. App. 22a-24a) inaccurately suggests that this Court's jurisprudence permits judicial endorsement of state-sponsored discrimination provided that the discrimination is applied only part-time. The evils of state

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> are superior to whites, and apparently it was this testimony that became transmogrified in the district court's opinion into "a security concern for potential racial conflict from the professed Rastafarian belief that dreadlock symbolizes black superiority." Actually there was no evidence that the dreadlock symbolizes black superiority, as distinct from being a conspicuous outward manifestation of Rastafarianism, a faith that does teach black superiority; however, as such a manifestation it might remind white inmates of the Rastafarian belief in black superiority. Yet this is pure conjecture, and to suppose that the wearing of dreadlocks would lead to racial violence is, on this record, the piling of conjecture upon conjecture.

racial segregation do not dissipate merely because it is doled out only in successive 60-day intervals, or because the inmate is not locked in a segregated cell for 24 hours a day.[20] Not only is the time spent by inmates in dining halls and on the yard inconsequential as compared to the time spent living and sleeping in racially segregated two-man cells, but the whole argument is flawed, and

> [a]kin to asserting that if a school-child only has to go to a segregated school one-third of the year, the requirements of *Brown v. Board of Education* are met. As the District of Columbia Circuit stated in *Pitts v. Thornburgh*, the right to be free from discrimination is the right to be free from a particular, definite, constitutional harm, not the right to engage in a particular activity or associate with particular persons.

Pet. App. 46a [Denial of Rehearing (dissenting opinion)]. *See also Adarand*, 515 U.S. at 229-30 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.").

The right to be free of racial discrimination does not lend itself to alternative channels of expression.

20. The Ninth Circuit's perception that the automatic segregation policy lasts for only 60 days is contrary to the record, which demonstrates that the automatic segregation policy is applied again upon transfer of any inmate. Pet. App. 2a, J.A. 302a-307a [Cambra Decl. ¶ 12]. As noted by the panel itself, "[i]f the inmate is transferred, he again goes through the initial housing screening process." Pet. App. 4a-5a.

Racial discrimination either occurs or it does not. *Cf. Harris v. Thigpen*, 941 F. 2d 1495, 1517 (11th Cir. 1991).

> [A]ny privacy right claimed here by the seropositive inmates in their medical status is a "passive" one. It is difficult to talk of "alternative means" of protecting such a right, since, unlike the first amendment context, there is no range or continuum of other affirmative activity against which to measure the encroachment of a given prison restriction. Just as one cannot be "a little bit pregnant," disclosure of one's HIV status either occurs or it does not. Thus, in our case, this particular factor of the *Turner* calculus does little to channel our inquiry into the *reasonableness* of the segregation policy as a restriction on seropositive inmates' right to privacy in disclosing their medical diagnoses.

Id. Because *all* prisoners are subject to the automatic segregation policy – there is *no* alternative – this *Turner* factor also weighs against the CDC policy.

Under *Turner*, the Court would also examine whether the CDC's automatic segregation policy may be justified as necessary to avoid a detrimental impact on prison resources. With respect to this factor, the CDC's entire argument below rested on the premise that initial cell assignments made without regard to race will inevitably lead to increased violence, but the CDC supplied no evidence to support this faulty premise. Other than a mere assertion of inevitable violence, nothing has been offered to support the notion that avoiding race-based criteria will cause more violence or any consequential strain on prison resources, and the experiences

of other jurisdictions suggest otherwise. The CDC produced no evidence to suggest that integration will create a ripple effect endangering staff and other prisoners, or require greater expenditure of scarce resources – and again, the empirical evidence from other prison systems suggests, to the contrary, that the level of violence will decrease with integration. *See* Trulson, *supra* note 5; Henderson, *supra* note 5. This *Turner* factor also condemns the CDC racial segregation policy.

The remaining *Turner* factor examines whether there exist "obvious, easy alternatives" that could achieve the same security purposes as the automatic segregation policy at *de minimis* cost to valid penological interests. *Turner*, 482 U.S. at 90-91. Here, such "obvious, easy alternatives" are plain. First, for all assignments subsequent to the first, the "obvious, easy alternative" is to look at the inmate's file and assign him to housing based on his own demonstrated character and conduct.[21] Second, even for the first assignment, the same alternatives applied by the Federal Bureau of Prisons and other states – looking at the pre-sentence report, or such other information as is made available to the prison system for every arriving inmate, and using any of the remaining tools of prison administration – suffice.

To the extent that the CDC repeatedly professes that its race-based policy is designed to avoid violent encounters between members of rival gangs, and believes that it is important to segregate prison cells by race because of "the gang involvement that is a part of many of the inmates'

21. Even those inmates who have not been incarcerated by the CDC previously will have jail records.

backgrounds" (J.A. 302a-307a [Cambra Decl. ¶ 9]), those goals can easily be achieved by screening inmates on the basis of easily observed signifiers of gang affiliation rather than by the color of their skin. In fact, this goal would be *better* achieved without using race-based criteria at all, given that many rival gang members are members of the same race (and many members of any race are not gang members).[22] In furtherance of its stated goal of maintaining prison security, the CDC could also refer to psychological profiles received when an inmate arrives at, or is transferred to, a CDC facility, indicating racial animus or a history of interracial violence. There is no need to make the unlawful and offensive assumption that all members of a particular race will become violent toward members of other racial groups, but not their own, if housed with inmates of other races. By minimally altering the screening criteria in this fashion away from a strictly race-based test, the same goals can be better achieved.

The Court has previously looked to well-run prison systems in other states, and the Federal Bureau of Prisons, in determining whether obvious, easy alternatives exist that do not unnecessarily impinge on inmates' rights. As noted

22. The CDC's assumption that merely being of the same race is a good proxy for compatibility is belied by the realities of prison gang violence. For example, members of the Aryan Brotherhood target and kill other members of the Aryan Brotherhood for reasons that have nothing to do with race. *See* David Grann, *The Brand: How the Aryan Brotherhood became the most murderous prison gang in America*, The New Yorker, Feb. 16, 2004, at 157. Nor do prison gangs operate along strict racial lines. There are mixed-race prison gangs and alliances between gangs of different races. Alan Elsner, *Gates of Injustice: The Crisis in America's Prisons* 41-42 (2004). For instance, the Aryan Brotherhood has a working relationship with the Mexican Mafia, and the Black Guerilla Family has been known to work with La Nuestra Familia. *Id.*

by the Court in evaluating *Turner*'s restrictions on First Amendment rights, "[o]ther well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and security." *Turner*, 482 U.S. at 93. The Federal Bureau of Prisons Program Statement 1040.04, Policy § 551.90 (1999), states that "Bureau staff shall not discriminate against inmates on the basis of race . . . [t]his includes the making of administrative decisions and providing access to work, *housing*, and programs." (Emphasis added.) Further, as mentioned above, other states that have desegregated two-man cells have found that racially motivated violence has decreased. *See* Trulson, *supra* note 5.

In short, the CDC's policy of racially segregating inmate cell assignments would fail even *Turner* review, were it applicable. The policy rests on premises (that inmates of different races will tend to be violent with one another, and that segregated cells will tend to reduce prison violence) that lack any rational support; it causes precisely the full harm that the Equal Protection Clause was intended to eliminate; it is not justifiable as conserving scarce administrative or economic resources; and there are ready alternatives that fully accommodate penological interests while affording inmates the equal protection and elimination of state-imposed segregation that the Constitution guarantees. State prison officials do not need discretion to routinely segregate prisoners by race and ethnicity. The discrimination tool is not one that prison officials ought to have.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed, and the case remanded for further proceedings in accordance with the Court's decision.

Respectfully submitted,

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In The Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES GOMEZ and JAMES ROWLAND,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

California prison officials have limited information about inmates' gang affiliations, enemy concerns, and potential for violence when the inmates are first received at a prison. Thus, inmates generally are not double-celled with inmates of another race until information is received to determine that it is safe to do so. That information is gathered during the sixty-day initial classification process. In most prison cases, *Turner v. Safley*, 482 U.S. 78 (1987) is used to evaluate the constitutionality of prison officials' actions.

1. Should the courts continue to give prison officials deference in the day-to-day management of prisons, or should strict scrutiny be used to evaluate whether California's initial double-celling practice is constitutional?

2. Does California's initial double-celling practice violate the Equal Protection Clause?

OBJECTION TO THE DESIGNATION OF PARTIES

Respondents disagree with petitioner's designation of the respondents. The only respondents are James Gomez and James Rowland, both former directors of the California Department of Corrections, who were granted qualified immunity from damages by the lower courts. Neither the State of California nor any other defendant is a respondent here, as Gomez and Rowland were the only parties to the appeal that is the subject of review.

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STATEMENT

A. The Impact of Race-Based Prison Gangs in California Prisons.

"Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). This case involves state prison officials' efforts to defuse this behavior in one place and one place only, namely, the two-man cell in which inmates are initially housed upon their arrival in the California prison system. It concerns those officials' efforts to address one dominant factor in the lives of inmates, whether newly received or already established: the race-based prison gang.

Modern observers of prisons recognize that prison gangs are "the most significant reality" in prisoners' lives. Willens, Jonathan A., *Structure, Content and the Exigencies of War: American Prison Law after Twenty-five years 1962-1987*, 37 AM. U. L. REV. 41, 56 (1987); see also DiIulio, John J., Jr., *Governing Prisons: A Comparative Study of Correctional Management* 129 (1987) (referring to prison gangs as "the chief operational fact of life inside California prisons"). Observers recognize that "gangs create the prisoner's new identity by recognizing the skills he has learned on the street and providing a way and a reason to use them in prison. The gangs also affirm the 'race consciousness' of the ghetto. They teach that the prison is a political place where being Black, white or Hispanic defines the prisoner's political position and where following the gang gives the prisoner political power." Willens at 57. They acknowledge that "prison can be a homecoming, provided that the man is a gang member who is assigned to the prison his gang controls. Then

the gang provides food and cigarettes, visits and gifts coordinated by allies outside, information about friends and enemies in the prison, and protection from the thieves and rapists who prey on new men." *Id.*

"Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry. Protecting staff from prisoners and prisoners from each other is a constant challenge." *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996). "'[T]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings.'" *Washington v. Lee*, 263 F. Supp. 327, 332 (M.D. Ala. 1968), quoting *Edwards v. Sard*, 250 F. Supp. 977 (D.C. Dist. 1966).

There are five major prison gangs in California: Mexican Mafia (EME), Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. Nuestra Familia (NF) created a subgroup called the Nuestra Raza, which currently enforces the interests of the NF while its members are isolated in security housing units. The Aryan Brotherhood is allied with the EME and is friendly with other white gangs such as the Hells Angels and the Nazi Low Riders. California Department of Justice, *Organized Crime in California 2003* 15-17 (2003) [hereafter California Department of Justice, *Organized Crime*].[1] California Hispanic inmates are divided geographically into Norteños (Northerners) and Sureños (Southerners). See California Department of Justice, *Gangs 2000: A Call to Action* 30

[1] Available at http://caag.state.ca.us/publications/org_crime.pdf

(1993);[2] *People v. Aguilera*, 51 Cal.App.4th 1151, 1156 n.3 (1996); see also J.A. 185a (inmates from California Avenue in Bakersfield or northward cannot be housed with Southern Hispanic inmates).

The prison gang culture is, above all, violent: "It includes forced prostitution and armed robbery. It also includes the violence necessary for its enforcement such as attacks on prisoners who interfere with prostitution or tell secrets." Willens at 61-62. It is common knowledge that some gangs require one inmate to kill another ("make your bones") in order to become a gang member. See *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1995) (Mexican Mafia); *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984); see also Grann, David, "The Band: How the Aryan Brotherhood became the most murderous prison gang in America," THE NEW YORKER 156 (Feb. 16 & 23, 2004).

Prison gangs operate both inside and outside of prison and control the activities of many street gangs. California Department of Justice, *Organized Crime*, *supra*, at 15 (2003). One of the primary sources of new prison gang members is street gangsters who are sent to prison, and some of the prison gangs are actively recruiting to bolster their ranks. *Id.* at 16. For example, the Black Guerrilla Family is experiencing a resurgence due to its recruiting efforts, and the Aryan Brotherhood is actively recruiting to compensate for some recent setbacks suffered as a result of gang-related federal indictments. *Id.* The increased recruiting efforts by the gangs and the resurgence of the Black Guerilla Family will lead to increased rivalries and

[2] Available at http://www.cgiaonline.org.

violence in the prisons. *Id.* at 17. The close affiliation between street gangs and prison gangs ensures that their rivalries and associated violence are factors from the moment new inmates – who may be street gang members – and repeat offenders – who may be prison gang members – arrive.

Violence in California prisons is well documented. The Ninth Circuit took notice of a series of race-based riots at Pelican Bay State Prison that resulted in one death and twenty-five injured inmates being transported to outside hospitals, as well as many other instances of violence that were reported in the media. Pet. App. 16a-18a n.9. The reported incidents include a race riot between Hispanics and African-Americans at Adelanto Prison during which six prisoners were injured, one critically, and after which 100 inmates had to be transferred; a lockdown following a riot at Lancaster Prison when large groups of Latino and white inmates rushed each other and ten inmates were injured; and a disturbance between 100 African-American and Latino inmates in an exercise yard at Folsom State Prison which led to the death of one prisoner and injuries to thirteen others. *Id.*

It is widely recognized that prison gangs are formed and organized along racial lines. *Harris v. Greer*, 750 F.2d 617, 619 (7th Cir. 1984) (taking judicial notice of fact that prison gangs are organized along racial lines). And courts have regularly acknowledged the ruthlessness of prison gangs. The Aryan Brotherhood, for example, has been recognized as "a singularly vicious prison gang," *United States v. Fountain*, 840 F.2d 509, 516 (7th Cir. 1988), that has a "hostility to black inmates," *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 984). The Mexican Mafia has been declared an "extraordinarily violent

organized criminal enterprise" whose members have engaged in murders, attempted murders, and conspiracies to commit murder; have testified falsely and threatened, assaulted, killed, or attempted to kill potential witnesses in pending cases; have vowed a "code of silence" to deny the existence of and membership in the Mexican Mafia; and have interfered with the judicial process by subpoenaing inmates under the guise of needing them as witnesses in their case, then attacking those persons in attorney visiting rooms. *United States v. Shryock*, 342 F.3d 948, 972 (9th Cir. 2003).

Prison gang politics dictate social protocols that must be honored. In California prison dormitories, for example, adjacent bunks may be white, African-American, or Hispanic, but problems occur if an inmate of one race is placed on a bunk above an inmate of another race. J.A. 190a-191a (fights have occurred when this was mistakenly done).

Neither petitioner nor his supporting amici dispute the existence of significant racial tension in California prisons. Petitioner himself admitted that he couldn't ask a white inmate to move in with him: "You can't cross races. That will start racial tension right there. So I know I can't go to a white guy and say, 'Hey, I want to move with you' because he is not going to move with me." J.A. 109a. Petitioner's fear appears to be a generalized one of cross-racial violence directed at him because he is African-American. See J.A. 117a.

In California, as in almost all prison systems, it has sometimes been necessary to take protective measures based on race (*e.g.*, after a race-based prison riot). See, *e.g.*, Pet. App. 16a-18a n.9. At issue in this case, specifically, is

California's process for assigning cells at the prison reception centers, to which we now turn.

B. Cell assignment in the reception center

The practice at issue in this case takes place only at "reception centers." Reception centers for men are located within seven of California's thirty-two prisons. When an inmate first enters the California state prison system, he is sent to a reception center where he undergoes processing and screening to determine his custody level and an appropriate permanent prison placement. In 2003, the seven reception centers for male inmates processed more than 40,000 newly admitted inmates and almost 72,000 inmates who were returned from parole. California Department of Corrections, *Movement of Prison Population* 3 (2003).[3] In addition, those seven reception centers processed a portion of the 254,000 already admitted male inmates who were moved from one facility to another over the course of the year. *Id.*; see n.9, *infra*.

When an inmate arrives at a reception center, prison officials have only limited information about him, particularly if he has never been housed at a California Department of Corrections (CDC) facility. The only information that counties are required to provide to the CDC when they deliver a convicted defendant to the CDC's custody is (1) a certified abstract of judgment or minute order, (2) a Criminal Investigation and Identification number, and (3) a confidential Medical/Mental Health Transfer Form indicating that the inmate is medically capable of being

[3] Available at http://www.corr.ca.gov/OffenderInfoServices/Reports/Annual/Move5/MOVE5d2003.pdf

transported. Cal. Penal Code § 1216 (West 2004). Any other information is gathered during the classification process itself. J.A. 303a. During this process, a thorough evaluation of each inmate's physical, mental and emotional health is completed. *Id.* In addition, he is given a battery of tests to determine his vocational and educational skills and goals. *Id.* The prisoner's criminal history, history in jail, and any previous prison or jail commitments are reviewed to determine his security needs and classification level.[4] *Id.* at 304a. During this time, classification staff determine whether or not the inmate has enemies elsewhere in prison, including people who may have testified against him in the past or in his criminal case, or inmates with whom he may have had disputes during previous jail or prison placements. J.A. 303a-304a.

In reception centers, inmates are usually housed two to a cell or in dormitories. J.A. 303a. Single cells are at a premium because California's seven reception centers for male inmates are operating far in excess of design capacity, from the least crowded at 200 percent, to the most crowded at 393 percent. See California Department of Corrections, *Weekly Report of Population as of Midnight July 7, 2004*.[5] Single-celling at reception centers is reserved for inmates who present special security problems, including those convicted of very notorious crimes; those in need of protective custody because of their effeminate appearance, extreme youth or old age, or small stature;

[4] There are four general classification levels, I-IV. Level I is equal to minimum security, level IV is maximum security. Petitioner is classified level IV.

[5] Available at: http://www.corr.ca.gov/OffenderInfoServices/Reports/WeeklyWed/TPOP1A/TPOP1Ad040707.pdf. The total male inmate population at reception centers was 17,130 and design capacity is 7,776 (CDC design capacity is defined as one inmate per cell).

former law enforcement officers; known informants; and known gang leaders. See, *e.g.*, CDC Dep't Operational Manual, § 61010.11.3 (2004).

In deciding cellmate assignments for this initial screening period, the principal concern of prison officials is the safety of the inmates and staff, and security of the prison. J.A. 303a. Officials seek to minimize the possibility of incompatibility, working with the limited information available at the time. For example, prison officials look at the relative ages of the potential cellmates, avoiding the placement of an older inmate with a much younger inmate. J.A. 244a, 249a. Similarly, prison officials look at the relative size of the potential cellmates, avoiding the placement of a large inmate with an inmate of a much slighter build. To the extent that they have the information at the time of housing placement, prison officials will also consider "case factors" and "custody concerns," which include the inmate's family relationships, education, past employment and military service, the need for psychiatric or specialized medical care, criminal and escape history, the need for protective or confidential placement, prison gang or street gang affiliation, and other individual safety concerns. J.A. 304a; see, *e.g.*, Cal. Code Regs tit. 15, § 3375.2 (discussing specific case factors and custody concerns). Officials try to discern gang affiliation from a number of visual cues including race, tattoos, haircut, or displays of gang colors on items of clothing or items carried on the person. See J.A. 184a.

Racial identification is far from the only factor considered in making initial cell assignments in reception centers, but it is an important one. J.A. 305a-306a. Race-based gang involvement is part of many inmates' backgrounds, and is generally found to play a role in those

inmates' anti-social, criminal behavior. J.A. 305a. Based on their day-to-day experience, prison officials know that the race of a cellmate can be the source of tension and possible violence. See J.A. 250a. Indeed, one prison administrator testified that if race were not considered in making this initial housing assignment, she felt certain there would be racially based conflict in the cells and in the prison yard. She was unwilling to knowingly disregard racial factors and place an inmate in jeopardy, and would not compromise inmate safety through actions that she felt certain would result in violence and conflict. J.A. 251a. This view was supported by then-acting Director of Corrections Steven Cambra. J.A. 305a-306a.[6] Because prison officials at the reception center generally lack complete information on inmates who are to be celled together, a newly arrived inmate is generally housed with an inmate of his own race. *Id.* But reception center inmates may cell with inmates of other races, upon request, if the inmates provide information that they are compatible. J.A. 183a-184a.

Housing in the close quarters of a two-man cell is the only context in which race is taken into consideration in the reception center. The confined nature of the reception center cells makes them potentially more dangerous than other areas of the prison. Staff cannot see into the cells without going directly up to them, and inmates sometimes place coverings over the windows so that staff cannot see

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[6] Prison officials also testified to being concerned that, if they did not take race into consideration in double-celling and injury resulted, they would be accused of "setting up" the conflict. J.A. 198a, 201a-202a. See, *e.g.*, *Mooring v. San Francisco Sheriff's Dep't*, 289 F. Supp.2d 1110, 1111 (N.D. Cal. 2003) (deputy accused of deliberately double-celling a Norteño with a Sureño inmate).

into them at all. J.A. 306a. Because of the currently high levels of gang-related racial violence in areas where inmates are easily observed and staff is able to rapidly intervene, administrators are concerned that inmates would be in greater danger in areas where staff may not easily observe them, the inmates have no ability to elude their adversaries, and staff could not safely respond in time to prevent injuries. J.A. 306a. Moreover, reception-center inmates are confined to their cells for much of the day. *Id.*

The initial screening and classification period typically takes around sixty days. J.A. 305a. After the classification period, the inmate is either retained in the permanent housing area of that prison or he is transferred to another institution. The re-screening process for transferred inmates is typically completed within fourteen days, as is required by the CDC's own policies.[7] To maximize the inmate compatibility and minimize the possibility of violence in the general prison population, inmates are permitted to select their own cellmates once they move to permanent housing. J.A. 311a. Both inmates must sign forms indicating that they would like to share a cell. When inmates request to be housed together, officials do not

[7] Although petitioner claims that an inmate undergoes a sixty-day classification period whenever the inmate is transferred within CDC, that is untrue. See, *e.g.*, Pet. Br. at 9, 37; see also U.S. Br. at 23. Transferred inmates are generally processed quickly at the new institution. The CDC Departmental Operations Manual section 62010.8.3 mandates that each inmate be reviewed and classified by a committee within fourteen days of arrival at the new institution. Regulations available online at: http://www.cdc.state.ca.us/RegulationsPolicies/PDF/DOM/Chapter%206%20Classification/Chapter%206.pdf. In any event, petitioner "explicitly disavowed" any challenge to the transfer policy at oral argument in the Ninth Circuit. Pet. App. 6a n.2.

consider race, and ordinarily grant the requests unless there are security reasons for denying them. J.A. 311a-312a.

All other aspects of an inmate's life in prison – both while at the reception center and afterwards – are managed without reference to his race or that of his fellow inmates. J.A. 250a. California expressly forbids racial discrimination in its prisons. See, *e.g.*, Cal. Code. Regs. tit. 15, § 3004(c) (2004). There is no distinction based on race for jobs, meals, yard and recreational time, or vocational and educational assignments. *Id.* And of course there is no evidence to suggest that certain cells are "set aside" in the reception center for occupation by only one race or another. In fact, the evidence showed that no cells are designated for any particular race and that the racial composition of the cells changes regularly. J.A. 188a.

C. The proceedings below

Petitioner Garrison Johnson, a California state prisoner serving a sentence of thirty-six years to life, contends that CDC's practice violates equal protection. Petitioner entered the California Institution for Men in Chino on June 22, 1987. J.A. 257a. Petitioner's classification process was completed twenty-eight days later. J.A. 259a-262a. Petitioner admits that before entering prison he was a member of the predominantly African-American Crips[8] street gang. J.A. 93a. Although he admits that he has never requested to be celled with an inmate of another

[8] See generally Alonso, Alejandro A., M.S., *African-American Street Gangs in Los Angeles*, National Alliance of Gang Invest. Ass'n (1998), available at http://www.nagia.org/Crips_and_Bloods.htm.

race (J.A. 112a),[9] Petitioner nonetheless sued California Department of Corrections' former Directors Gomez and Rowland for damages, and he has sued the Director[10] in her official capacity for injunctive relief.

Johnson filed his original complaint in 1995.[11] After a series of amendments in response to motions to dismiss, Johnson filed a Third Amended Complaint. The State again moved to dismiss and the district court dismissed the complaint without leave to amend for failing to state a claim under *Turner v. Safley*, 482, U.S. 78 (1987). J.A. 25a-26a; see July 1, 1997 Report and Recommendation of United States Magistrate Judge at 10, citing *Turner*, adopted in its entirety by district court's January 8, 1998 Order, district court docket numbers 58 and 62, respectively ("Plaintiff must plead that the Defendant's alleged

[9] It is questionable whether petitioner even has standing to pursue his claim. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief). Petitioner is challenging a practice that has not applied to him since 1987. J.A. 259a-262a. And he has expressly waived any challenge to the process that applies to inmates transferring between prisons. Pet. App. 6a n.2. Inmates have been granted requests to cross-racially cell during the classification process. See J.A. 183a-184a, 199a. Petitioner has never asked to cell with an inmate of another race and, thus, he has never been expressly denied the opportunity. J.A. 112a. Because of petitioner's admitted pre-prison affiliation with the African-American Crips street gang, and not because of his race, petitioner would not have been eligible to double-cell with a white cellmate while he was being classified at the reception center.

[10] Jeanne Woodford is the current CDC Director. The injunction proceedings are stayed in the district court pending conclusion of this proceeding.

[11] Petitioner's claim is not barred by the statute of limitations for California life-prisoners that was in effect at the time the complaint was filed.

action in segregating inmates was not reasonably related to any legitimate penological interest").

The Court of Appeals for the Ninth Circuit reversed in part and remanded, holding that petitioner had sufficiently alleged an equal protection claim for racial discrimination, citing *Turner*, and that he should be given an opportunity to amend portions of his complaint. J.A. 158a-168a.

Both parties then conducted discovery and cross-moved for summary judgment on the equal protection claims. The district court denied petitioner's motion and granted in part and denied in part respondents' motion. J.A. 421a. Specifically, the court denied summary judgment for respondents on the basis of qualified immunity and denied summary judgment as to petitioner's claim against the current Director for injunctive relief. J.A. 420a-425a.

Nine days later, however, this Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), providing further guidance in the proper application of qualified immunity. In view of *Saucier*, respondents Gomez and Rowland moved for reconsideration of the qualified immunity ruling. The district court granted reconsideration, and found that Gomez and Rowland were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. 32a-35a.

The district court entered judgment for Gomez and Rowland under Federal Rule of Civil Procedure 54(b), J.A. 40a, docket 133, and petitioner immediately appealed only the grant of qualified immunity. There has been no final judgment with respect to the current CDC director, who is

sued for injunctive relief only, and no appearance was ever entered for the State of California.

On appeal, the parties no longer contended that anything other than the initial sixty-day policy was relevant; "Johnson's counsel at oral argument explicitly disavowed any challenge to the continuing effects of the CDC's housing policy and limited the challenge only to the sixty-day policy itself." Pet. App. 6a n.2. Thus, the only question before the appellate court was whether the CDC's use of race as a factor in making the temporary sixty-day housing decision violated the Equal Protection Clause.

The Ninth Circuit found that while this Court's per curiam decision in *Lee v. Washington*, 390 U.S. 333 (1968), held that segregated cell blocks were unconstitutional, this Court's *Turner* opinion expanded *Lee*'s definition of "particularized circumstances" and "necessity for security and discipline," and imposed a heavy burden on inmates seeking to prove a particular practice unconstitutional. Pet. App. 9a-13a. The appellate court found that to the extent that *Lee* and *Turner* diverged, it was bound to follow *Turner*. *Id.*

In applying *Turner*, the appellate court found that respondents' practice met all four *Turner* factors: (1) whether the officials' actions are rationally related to a legitimate, neutral objective; (2) whether alternative means exist to exercise the inmates' rights; (3) the impact that any accommodation of the asserted right would have on guards, inmates, and resources; and (4) whether there are ready alternatives to the policy. Pet. App. 14a-31a. Because the appellate court found that there was no constitutional violation, it ended its inquiry there. Pet. App. 31a.

Petitioner sought rehearing and rehearing *en banc*. The petition for rehearing was denied.

SUMMARY OF ARGUMENT

Every day, prison officials are called upon to make decisions that require balancing inmates' individual liberties against the needs of the institution as a whole, and against the competing constitutional rights of other inmates. Recognizing the complex and dynamic nature of this enterprise, and respecting the constraints imposed on courts by principles of federalism and separation of powers, this Court has traditionally reviewed prison officials' decisions with considerable deference. Thus, *Turner v. Safley* sets forth a four-part test for assessing prisoners' constitutional claims. An action that impinges on inmates' constitutional rights is generally valid if it is reasonably related to a legitimate penological interest.

Since *Turner* was decided, this Court has repeatedly held that its standard applies to a wide variety of fundamental rights, including freedoms of speech and association, access to courts, and substantive due process claims under the Fourteenth Amendment. Even where *Turner* has not expressly been applied, as in Eighth Amendment cases and claims of procedural due process violations, the Court has announced highly deferential standards designed to leave prison officials with an unusual degree of discretion. *E.g., Sandin v. Conner*, 515 U.S. 472 (1995); *Whitley v. Albers*, 475 U.S. 312 (1986).

This case presents no occasion for carving out an exception to the unbroken tradition of deference to prison officials' informed judgments. Unlike other equal-protection

contexts where strict scrutiny has been applied to race-based decision making, the practice at issue here is uniquely a product of the volatile prison environment, and it neither benefits nor burdens one group or individual more than any other group or individual. While lower courts have reached differing interpretations of this Court's statements in *Lee v. Washington*, 390 U.S. 333 (1968), *Turner* and its progeny may be fully harmonized with *Lee*. Furthermore, the four factors of the *Turner* test are rigorous and searching enough to root out any invidious discrimination against prisoners.

Applying the *Turner* standard to the facts of this case, the practice of housing each newly arrived inmate with another of his own race is seen to be constitutional. The unassailably legitimate purpose of the practice is to reduce the threat of racial violence between inmates, a threat that is deadly serious in light of California's experience with violent, race-based prison gangs. Even though inmates are assigned to share cells with inmates of their own race at reception centers, all other aspects of prison life, inside the reception center and out, are integrated. Disregarding race, on the other hand, would expose reception-center inmates to an unacceptable risk of harm, as courts have concluded in other prison contexts. And, since no one has come forward with an obvious, easy alternative solution, the practice satisfies the standard set forth in *Turner*.

Even under a strict scrutiny analysis, the temporary double-celling practice would meet constitutional requirements. Respondents suggest that, if strict scrutiny is to be applied in this case, the parties and the court should have the benefit of additional opportunities to discover and present relevant evidence. But even if not, the record

would support affirmance. The state's interest in curtailing prison violence is not merely legitimate; it is compelling. Further, the double-celling practice is narrowly tailored to address a pervasive risk of violence in a narrow, but urgent context: Where will an inmate rest, wait, and sleep the day he "gets off the bus," and for up to 60 days thereafter while prison officials gather the information they need to make a permanent housing assignment? While peace among all inmates may be the ultimate penological goal, the fact that rival prison gangs are divided along racial lines requires prison officials, as a matter of Eighth Amendment law, to consider race as one factor in initial cell assignments.

Finally, because the issue of which legal standard should apply to their conduct has been an open question until now, respondents assert that they must be entitled to qualified immunity from damages in any event.

ARGUMENT

I.

THE *TURNER* STANDARD IS APPROPRIATE TO DETERMINE WHETHER THE CDC'S TEMPORARY DOUBLE-CELLING POLICY IS CONSTITUTIONAL, BECAUSE IT AFFORDS PRISON OFFICIALS NEEDED DEFERENCE AND IS ADEQUATE TO SAFEGUARD INMATES' CONSTITUTIONAL RIGHTS.

A. *Turner v. Safley* Expresses the Long-Standing Principle that Courts Are to Defer to Prison Administrators' Expert Judgments.

Courts have long recognized that prison administrators, not courts, are best equipped to deal with the daily

operations of prisons. This principle was at the crux of this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, this Court reconciled the obligation of federal courts to "take cognizance of the valid constitutional claims of prison inmates," *id.* at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405), on the one hand, with the recognition that, among the three branches of government, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *id.* (quoting *Martinez* at 405). Neither petitioner nor any of his supporting amici comes close to showing how courts are better equipped to deal with the problems of race-based gang violence in prisons than they are equipped to deal with issues of inmate correspondence or inmate desires to marry.

Deference to the particular expertise of prison officials in the difficult task of managing daily prison operations did not begin with the *Turner* decision and will not end with this case. This Court, in numerous prison cases both before and after *Turner*, has repeatedly instructed federal courts to defer to legitimate institutional needs in the operations of state prisons. See, *e.g.*, *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977) (noting that the judicial branch must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"). This Court knows that "'the problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.'" *Rhodes v. Chapman*, 452 U.S.

337, 351, n.16 (1981), quoting *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974).

It is the nature of prison life that an inmate's individual liberties must be balanced not only against the interests of the state, but also against the constitutional rights of other inmates. This Court considered prison officials' duty to protect inmates in *Farmer v. Brennan*, 511 U.S. 825 (1994), and held that prison officials violate the Eighth Amendment when they know of and disregard a substantial risk of serious harm to an inmate. *Id.* at 827. The *Farmer* Court understood that, "[h]aving incarcerated persons with demonstrated proclivities for antisocial, criminal, and often violent conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer v. Brennan*, 511 U.S. at 833. Moreover, Justice Blackmun recognized that many inmates are sent to prison for non-violent offenses and characterized the responsibility of prison officials to protect inmates from harm as an "affirmative duty . . . not to be taken lightly." *Id.* Recognizing that prison administrators are regularly called on to balance competing constitutional interests under highly dynamic conditions, this Court has traditionally afforded them considerable deference in their decision making. See *Turner*, 482 U.S. at 89.

This tradition of deference stems not only from the recognition that prison officials have special expertise, but also from principles of federalism and separation of powers. See *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the

administration of prisons"); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial").

The delicate balance of deference, federalism, and the separation of powers led this Court to craft the *Turner* test and make clear that whenever "a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. In applying the *Turner* reasonable-relationship test, four factors are relevant in determining whether the prison practice is constitutional: whether the practice has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the practice. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Turner*, 482 U.S. at 89-91. The *Turner* Court recognized that strict scrutiny was inappropriate in the prison context because, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.*

B. Deferential Standards Are Applied to All Constitutional Claims Made by Prisoners.

Since *Turner* was decided, this Court's opinions have repeatedly emphasized that the *Turner* test applies to prisoners' constitutional claims regardless of the standard

of review that would be applied outside prison walls. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court held that even when strict scrutiny otherwise would apply to the policy in question, the exigencies of prison administration require only that the regulations be reasonably related to a legitimate penological interest. *Id.* at 407-09, 412 (prisoner correspondence). In *Washington v. Harper*, 494 U.S. 210 (1990), this Court addressed a prisoner's Fourteenth Amendment due process claim and reaffirmed its intent that *Turner* be followed, declaring, "[W]e made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id.* at 223-24. And in *Lewis v. Casey*, 518 U.S. 343 (1996), this Court applied *Turner* to prisoners' access-to-the-courts claims, even though that fundamental right would otherwise be subject to strict scrutiny. *Id.* at 361.

The *Turner* standard and the principle of deference to prison administrators were again recently reaffirmed in *McKune v. Lile*, 536 U.S. 24 (2002) (prison officials' requirement that sex offenders admit guilt in order to be eligible for treatment program); *Overton v. Bazzetta*, 539 U.S. at 131 (freedom of association claims relating to family visitation); and *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (First Amendment challenge to prison regulation restricting inmate correspondence). These cases underscore the continuing vitality of the *Turner* standard for evaluating constitutional claims in the prison context.

Both the petitioner and amici United States and the ACLU argue that this case is different from the many cases in which this Court has applied *Turner*. Petitioner argues that *Turner* has never been applied to an equal protection claim by a suspect class. Pet. Br. at 27. The

ACLU argues that *Turner* applies only when rights are "exercised" rather than "enjoyed." ACLU Br. at 17. And both the United States and the ACLU argue that consideration of race should be subjected to a different test just as the Eighth Amendment cases receive their own tests. U.S. Br. at 15-16, ACLU Br. at 17-21.

But in the prison setting, every test for constitutionality is deferential to prison officials regardless of whether the test fits squarely within *Turner's* ambit. For example, excessive force in prison is unconstitutional only if it is inflicted maliciously and sadistically for the very purpose of causing harm. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). In contrast, excessive force outside of prison is unconstitutional if it is merely unreasonable. *Graham v. Conner,* 490 U.S. 386, 395 (1989).

Due process claims are similarly restricted in prison. This Court applied the *Turner* test to a substantive due process claim challenging involuntary medication of a mentally ill inmate. *Washington v. Harper*, 494 U.S. at 221-23. In that case, the Washington Supreme Court had declined to apply the *Turner* standard to the policy at issue, reasoning that the inmate's liberty interest was distinguishable from the First Amendment rights at issue in both *Turner* and *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987). *Washington v. Harper,* 494 U.S. at 223. But this Court reversed, emphasizing that the *Turner* standard was "based upon the need to reconcile [the Court's] longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the

Constitution, not just those in which the prisoner invokes the First Amendment." *Id.* at 223-24 (internal citations omitted). The *Turner* standard is not limited to just those rights that are expressive or passively "enjoyed" as amicus ACLU contends.

Although this Court did not apply the *Turner* standard when it analyzed an inmate's due process rights in *Sandin v. Conner*, 515 U.S. 472 (1995), it did apply a very deferential standard to determine whether state regulations had created liberty interests. *Id.* at 484. Later, this Court recognized in *McKune v. Lile*, 536 U.S. 24, 37 (2002) that "*Sandin* and its counterparts underscore the axiom that a convicted felon's life in prison differs from that of an ordinary citizen" and that *Sandin*'s limitations were grounded in *Turner*'s deferential standard: "The limitation on prisoners' privileges and rights also follows from the need to grant necessary authority and capacity to federal and state officials to administer the prisons," and "[f]or these reasons, the Court in *Sandin* held that challenged prison conditions cannot give rise to a due process violation unless those conditions constitute 'atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life.'" *McKune*, 536 U.S. at 37 citing and quoting *Sandin*, 515 U.S. at 484 and citing *Turner*, 482 U.S. 78 (alterations in original).

Thus, every constitutional standard applied in prison is informed by the unique environment of prison and its operational challenges and affords the deference necessary to accommodate those factors.

C. This Court Should Not Craft an Equal Protection Exception to *Turner*.

Petitioner and amici argue that strict scrutiny is the proper test in this case and that recent cases support the view that all state racial classification claims are subject to strict scrutiny. See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (using racial preferences in undergraduate admissions subject to strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (race-conscious law school admissions policy subject to strict scrutiny); *Adarand Construction, Inc. v. Pena*, 515 U.S. 200 (1995) (providing financial incentives to hire minority contractors subject to strict scrutiny); and *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (minority contracting quotas subject to strict scrutiny). But none of those cases arose in the prison context, where competing constitutional concerns and the need to safely administer a volatile, violent environment are paramount.

Furthermore, unlike here, all of those cases involved a benefit conferred or a burden suffered by the parties. There is no evidence that the practice at issue here works a deprivation on either cellmate, *cf. Loving v. Virginia*, 388 U.S. 1 (1967) (equal application of prohibition against mixed-race marriage implicated Fourteenth Amendment and burdened each of the parties on account of race); nor is there evidence that the practice works to the advantage of either cellmate on account of his race, *cf. Grutter v. Bollinger*, 539 U.S. 306 (2003) (race as a factor in college admissions); *Shaw v. Reno*, 509 U.S. 630 (1993) (district lines drawn to maximize minority voting strength).

This Court first faced a prisoner's racial discrimination claim in *Lee v. Washington*, 390 U.S. 333 (1968),

which affirmed the unconstitutionality of state statutes that required completely segregated prisons and jails. Predating *Turner*, *Lee* struck down a state statute that required the complete racial segregation of prisons and jails.[12] Although some courts have interpreted *Lee* to invoke a strict scrutiny analysis, there is no discussion of strict scrutiny in the short per curiam opinion. On the other hand, the concurring opinion emphasized that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee*, 390 U.S. at 334 (Black, Harlan, Stewart, JJ., concurring).

The lack of clear direction in *Lee* led the circuit courts to apply inconsistent standards for prison racial equal protection claims. The Ninth Circuit (in this case and one other) and the Fourth Circuit have both used the *Turner* standard, while the Fifth Circuit has used *Lee*'s "particularized circumstances" with no discussion of strict scrutiny, and the Seventh Circuit has used the strict scrutiny standard. *Walker v. Gomez*, 370 F.3d 969 (9th Cir. 2004) (applying *Turner* to find that inmate's rights were violated when, after three prison lockdowns, he was not allowed to resume his prison job until after similarly-situated inmates of other races); *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (applying *Turner* to find that inmate's rights were violated when officials denied him Native American religious items because he wasn't Native American); *Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994)

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[12] In contrast, California expressly forbids discrimination in its prisons on the basis of race. See, *e.g.*, Cal. Code. Regs. tit. 15, § 3004(c) (2004).

(finding no "particularized circumstances" to justify permanent segregation of two-man cells where white inmates received preferential treatment); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987) (applying strict scrutiny to inmate's claim of racially discriminatory job assignments).[13]

It is not necessary to overrule *Lee* in order to apply the *Turner* standard in this case because *Lee* is consonant with *Turner*. *Turner* provides the specific standard to be used when reviewing a prison operational rule, taking into account the "particularized circumstances" that the *Lee* Court recognized could justify separating prisoners on the basis of race.

Good faith and particularized circumstances are implicit in the *Turner* standard; it requires that the officials' actions, policies, or practices be rationally related to a legitimate and neutral objective, and that the existence of ready alternatives be examined. Actions taken in bad faith would not further a legitimate and neutral objective, nor would they be rationally related to it. The particularized circumstances contemplated in *Lee* are encompassed by the *Turner* standard's examination of

[13] Although not directly at issue in this case, courts have also applied inconsistent standards in evaluating quasi-suspect classes in prison. *Compare Veney v. Whyde*, 293 F.3d 726 (4th Cir. 2002) (*Turner* applied to claim of gender bias in practice prohibiting double-celling homosexuals); *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002) (*Turner* applied to challenge cross-gender strip searches); *and Yates v. Stalder*, 217 F.3d 332 (5th Cir. 2000) (*Turner* applied to gender-based claim of disparate conditions between male and female prisons); *with Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (strict scrutiny applied to inmate's gender-based equal protection claim); *and Pargo v. Elliott*, 49 F.3d 1355 (8th Cir 1995) (strict scrutiny applied to inmate's gender-based claim).

whether there are ready, obvious alternatives to the challenged policy. The absence of ready alternatives would counsel that particularized circumstances exist that cannot otherwise be addressed.

Although the *Turner* standard is a deferential one, it is not without force. Prison policies and practices involving suspect classes and fundamental rights have been struck down using *Turner*, including a post-*Johnson* decision by the Ninth Circuit. See *Walker v. Gomez*, 370 F.3d 969 (9th Cir. 2004) (affirming that prison officials' race-based actions violated inmate's equal protection rights); see also *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (affirming injunction against prison officials in race-based discrimination claim); *Bear v. Kautzky*, 305 F.3d 802 (8th Cir. 2002) (affirming preliminary injunction against prison officials in access to courts claim); *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001) (affirming preliminary injunction against prison officials in free exercise of religion claim); *Hakim v. Hicks*, 223 F.3d 1244 (11th Cir. 2000) (affirming that prison policy violated inmates' free exercise of religion). Thus, the *Turner* standard provides courts with an effective tool to protect inmates' rights while at the same time according officials the needed deference to administer the prisons.

Neither petitioner nor amici has established why this Court should depart from its repeated admonition that any impingement of prisoners' constitutional rights is to be measured under a deferential standard. This Court's opinions repeatedly express the view that "such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Turner*, 482 U.S. at 89

quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 128.

This Court should not craft an equal protection exception to the *Turner* test because the same principles that guide the application of *Turner* for other constitutional claims also apply here.

II.

THE CDC'S CONSIDERATION OF RACE AS ONE FACTOR IN ASSIGNING TEMPORARY CELLMATES SATISFIES THE *TURNER* STANDARD AND IS THUS CONSTITUTIONAL.

Under *Turner*, the petitioner bears the burden of overcoming "the presumption that the prison officials acted within their broad discretion." *Shaw v. Murphy*, 532 U.S. at 232. Courts should look to four factors to determine if the *Turner* standard is met. Each of the four *Turner* factors is addressed in turn here.

A. There is a valid, rational connection between CDC's practice and the legitimate penological interest of preventing violence.

The issue at the heart of the *Turner* test is whether there is a valid, rational connection between the regulation and the asserted goal. A regulation or practice "cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. The objective must be both legitimate and neutral. *Id.* at 90.

This Court has long held that prevention of inmate violence is a legitimate goal in prisons: "[M]aintaining institutional security and preserving internal order and discipline are essential goals," and "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel. . . . " *Bell v. Wolfish*, 441 U.S. at 546-47.

In addition to serving a legitimate goal, the practice must be applied in a neutral manner. *Turner*, 482 U.S. at 90. Here, violence prevention is a goal that cuts across all racial lines, and all of the evidence showed that the CDC's cell assignment practice operates in a neutral manner. There are no cells designated for any particular race and the racial composition of the cells changes regularly as inmates move in and out. J.A. 188a. There is no evidence that any race enjoys a benefit or suffers a burden, or that any race is granted a more favorable location or special privileges. The practice is applied to all inmates regardless of their race. See, *e.g.*, J.A. 305a.

The practice must also be rationally related to the objective. *Thornburgh v. Abbott*, 490 U.S. at 414. Prison administrators here use race as one of many factors in making their initial housing assignments; at no institution is race the sole factor in a housing decision. J.A. 305a. The initial period in prison is a critical time for prison officials and inmates alike. It is essential that the inmates be protected from one another until sufficient information is obtained to make a more in-depth determination about their compatibility with other inmates. The fact that prison and street gangs divide along racial lines is a distasteful reality, but a reality that must be taken into account when little information is available about the inmates other than their race.

Although petitioner contends that there is no evidence supporting the connection between the CDC's practice and its goal of preventing violence, that is simply untrue. Gang and race-related violence is a harsh reality in California prisons. As the Ninth Circuit noted after citing to many documented instances of violence in California prisons, "This is hardly a case where the prison administrators are acting on an unsubstantiated record." Pet. App. 18a n.9. Other systems have experienced similar violence. The worst prison riot in Ohio's history and one of the worst in United States history occurred after a consent decree mandated that inmates be integrated in double-cells. See *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993). Nine inmates and one correctional officer were murdered and many others were injured during the eleven-day standoff. During negotiations, as well as after the riot, prisoners repeatedly cited integrated double-celling as a factor contributing to the tense atmosphere there. The siege finally ended when the court agreed to review the double-celling policy. *Id.* at 1130. The integrated double-celling policy was cited as a primary factor in the riot. *Id.*

It is crucial that officials making initial cell assignments be given the discretion and flexibility to protect incoming inmates until more information, including any gang affiliation, is known. Prison officials exercise this duty to protect by not double-celling inmates who are potentially members of rival gangs. Because race is a primary factor in gang affiliation, newly arrived inmates are generally celled with members of their own race. While this is not a fail-safe method because members of the same race may also be rivals, it is one way to reduce potential violence. Visual cues like tattoos, haircuts, displays of gang colors on clothing or personal items also assist

officials in determining gang affiliation and are taken into consideration in cell assignments. J.A. 184a.

Officials may not make "[r]outine and automatic" assertions that every step taken to protect prisoners' "constitutional rights will lead to a breakdown in institutional discipline and security." *Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985). But neither must they wait until violence occurs before acting and may instead "anticipate security problems and . . . adopt innovative solutions to the intractable problems of prison administration." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, quoting *Procunier v. Martinez*, 416 U.S. at 405.

Because prison officials put forth evidence that, in their experience, racial tensions would be exacerbated if race were not considered as a factor in double-celling inmates at the reception centers, they met their burden of establishing a logical connection between the celling practice and the goal of preventing violence. The Ninth Circuit found that petitioner did not meet his burden of refuting the connection between the CDC's practice and its goal of preventing violence. Pet. App. at 21a-22a. Johnson argued that because racial violence continues to permeate the CDC, the double-celling practice must not work, and that because not all gangs are formed along racial lines, the practice is irrational. Pet. App. 20a-21a. But simply because the CDC practice is not a "magical elixir," "does not mean that pre-existing policies do not work to reduce violence from being more pervasive than it already is." Pet. App. 21a. There is no one practice or policy that can ameliorate all concerns. Prison officials do their best under the trying circumstances presented to them.

The CDC's practice furthers a legitimate goal of preventing violence, operates in a neutral manner that

neither benefits nor burdens any one race, and is rationally related to the goal.

B. There Are Alternative Means of Exercising the Constitutional Right.

Courts should be particularly conscious of the measure of judicial deference owed to corrections officials where other avenues remain available for the exercise of the asserted right. *Turner*, 482 U.S. at 90. Petitioner asserts that his right is to be free of race-conscious decision making by CDC officials. Pet. App. 23a. As the Ninth Circuit correctly analyzed it, the right at issue must be viewed expansively and sensibly.[14] *Thornburgh v. Abbott*, 490 U.S. 417. Thus, the court viewed the right "at a macro level" in terms of the right to be free from racial discrimination generally, rather than at the micro level of forcing officials to disregard race entirely in temporary cellmate assignments. Pet. App. 23a. This is consistent with the approach this Court used in *Turner* when it viewed the right at stake as "freedom of expression" in its totality, rather than as the specific right to communicate with inmates at other prisons. *Turner*, 482 U.S. at 92.

Here, all other aspects of prison life are fully integrated. Inmates from all races participate together in jobs; vocational, and educational assignments; dining halls; exercise yards; and recreation time. J.A. 250a. After the

[14] For purposes of these proceedings, respondents do not contest the conclusion that petitioner's claim of "racial classification" implicates the Fourteenth Amendment. But while respondents concede that the practice at issue here is "race conscious," that "consciousness" is only of the racial dissimilarity between two potential cellmates; the race *per se* of either of the cellmates is of no consequence.

brief period at the reception center, the CDC's practice is for inmates to select their own cellmates regardless of race. J.A. 251a, see J.A. 307a. The inmates' requests are then usually granted - unless there are individualized security reasons for denying them. *Id.* The goal in this process is for inmates to find cellmates with whom they are compatible. *Id.*

The brief period at the reception centers when inmates are generally assigned to share a cell with someone of the same race does not constitute an impingement on Johnson's right to be free from racial discrimination generally.[15] Given the full integration of the prisons at every other level, the CDC's practice meets the alternative means prong of the *Turner* test.

C. There Would Be a Significant Impact on Prison Personnel, Other Inmates, and Resources in Assigning Reception Center Cellmates Differently.

Courts must also consider what impact accommodating the inmate's asserted right would have on prison personnel, inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90.

Disregarding race altogether in making initial reception center housing assignments would lead to increased gang-related racial violence both in the cells and in the

[15] Amicus United States criticizes respondents for applying the normal practice to petitioner Johnson when he transferred prisons, inasmuch as he had already been in the prison system for several years. U.S. Br. at 23. But the United States ignores the fact that, whatever information respondents may have had about Mr. Johnson, they likely had much less information about the inmate with whom Mr. Johnson would be celled during this transition period.

common areas of the prison. J.A. 250a-251a, 305a-306a. CDC administrators state that disregarding race would violate their obligations under the Eighth Amendment to protect inmates from a known danger. J.A. 201a, 251a, 305a. Because of the limited number of staff available to oversee the many cells, it "would be very difficult to assist inmates if the staff were needed in several places at one time." J.A. 306a. Consequently, both staff and inmate safety would be compromised because violence would increase and staff resources would be stretched beyond the capacity to adequately respond. Additionally, when prison resources are diverted to tend to one area of concern, they are necessarily displaced from other operations, leading to disruption of services.

Staff would have a difficult time controlling problems in the individual cells if race were disregarded entirely, and there would be fights in the cells that would later spill over to the exercise yards. J.A. 306a, see also 187a. This "ripple effect" of violence spreading from the cells to the yards and endangering both inmates and staff is exactly the kind of thing that the *Turner* Court counseled requires particular deference: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90.

Prison officials proffered sufficient evidence to show that not considering race at all when assigning reception center cellmates would have a negative impact on guards, inmates and prison resources.

D. There Are Presently No Reasonable Alternatives.

Lastly, courts must examine whether reasonable alternatives exist that would fully accommodate the prisoner's rights at minimal cost to valid prison interests. *Turner*, 482 U.S. at 91. While the practice need not be a perfect fit to the goal, it cannot be an exaggerated response. *Id.* at 90. But "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91. The burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the practice or regulation. See *O'Lone*, 482 U.S. at 350.

Petitioner offers no reasonable alternatives. He suggests that officials could inquire into an inmate's gang affiliation, or whether he has a psychological profile involving racial animus, or whether he has a history of racial violence. J.A. 333a. These suggestions, however, ignore the fact that such inquiries can take time, and the inmates still need to be assigned a place to sleep in the meantime.

With respect to gang affiliation, the Ninth Circuit pointed out, "There is little chance that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate." Pet. App. 28a, see also J.A. 314a ("gang culture is that [they] do not talk to staff"). If gang affiliation is known, however, it is taken into account in the initial cell assignment. J.A. 315a ("[it's] first and foremost").

As for the psychological profile or history of violence, there is no evidence in the record to suggest that there is

time to administer and analyze the necessary history or testing before the first housing decision is made, nor that the cost would be minimal. See *Turner*, 482 U.S. at 91. Even if officials have information regarding an inmate's behavior outside of prison, that is not always an accurate predictor of in-prison behavior. The Ninth Circuit correctly observed that "[t]he CDC cannot accurately gauge an inmate's propensity for violence without first observing him in this new environment." Pet. App. 29a.

It is important to remember that the practice at issue is what officials do when prisoners first "get off the bus" after arriving at the prison. They must be housed somewhere, and the decisions must be made immediately. Processing more than 110,000 inmates per year does not allow officials the luxury of relaxed reflection when inmates are first arriving. Overcrowding at the reception centers is acute, and single-cells must be limited to accommodating the most serious safety- or inmate-management concerns.

Further, once reception center cellmates have been assigned, it would make no sense to reassign cellmates before the classification process is complete and the inmates are transferred to their permanent assignments. To do so would result in constantly rehousing inmates, further expending already strained prison resources. Moreover, if the point would be to remedy the initial race-conscious cellmate assignment, officials would have to make a second race-conscious decision in order to ensure maximum integration. And if the inmate would end up double-celling with a member of his own race upon reassignment, as will inevitably happen in some cases according to the rules of chance, then the reassignment would have been pointless. Therefore, once the initial assignment

is made and the classification process has started, it is best to allow that process to be completed without making more temporary housing assignments.

Not only has petitioner not shown any ready alternatives to the CDC's practice, he has failed to consider the duty of the officials to take reasonable measures to protect inmates from a known risk of harm. The Ninth Circuit, however, did not ignore that duty when it recently denied qualified immunity to officials who *did not* take inmates' race into account when releasing them to exercise yards, concluding that the officials were aware that placing inmates of different races on the exercise yards at the same time presented a serious risk of harm. J.A. 30a, *Robinson v. Prunty*, 249 F.3d 862, 866-68 (9th Cir. 2001). Just as with yard releases, officials must be cognizant of the dangers presented and take reasonable measures to deter violence when placing unknown inmates together in small cells.

The CDC's practice is not an exaggerated response; it is a measured response that is done to protect inmates and staff from in-cell violence. The practice satisfies the fourth prong of the *Turner* test.

III.

EVEN UNDER A STRICT SCRUTINY ANALYSIS, THE CDC'S TEMPORARY HOUSING PRACTICE IS CONSTITUTIONAL.

A. Remand is Appropriate.

If this Court decides that strict scrutiny is the appropriate standard and if it finds the CDC's practice does not meet that standard on the evidence presented, the Court

should consider remanding that issue to the district court because the evidentiary record was not developed with the aim of proving compliance with the strict scrutiny standard. See *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992) (when new legal standard announced, case remanded to develop necessary facts). When the Ninth Circuit first considered this case, it reversed a Federal Rule of Civil Procedure 12(b)(6) dismissal and cited both *Lee* and *Turner* for the proposition that inmates may not be discriminated against; there was no discussion of strict scrutiny in the opinion. *Johnson v. State of California*, 207 F.3d 650, 655 (9th Cir. 2000). Moreover, the district court's order that was the subject of the first appeal specifically stated that *Turner* applied to the equal protection claim.[16] The defendants' discovery, which was taken after remand, was focused on meeting the rational relationship test of *Turner*, rather than strict scrutiny, given the Ninth Circuit's and the district court's citations to *Turner* and the absence of any indication by either court that strict scrutiny applied.

Under a *Turner* analysis, evidence of alternative means is not material unless a plaintiff shows that the officials' actions are an exaggerated response. See, *e.g.*, *Turner*, 482 U.S. at 90. As the Ninth Circuit found, petitioner did not meet his burden on that prong. Pet. App. 27a-31a. There was, therefore, no reason for respondents to produce evidence regarding alternative means that

[16] "Plaintiff must plead that the Defendant's alleged action in segregating inmates was not reasonably related to any legitimate penological interest." July 1, 1997 Report and Recommendation of United States Magistrate Judge at 10, citing *Turner*, adopted in its entirety by the district court's January 8, 1998 Order. District Court docket numbers 58 and 62, respectively. See J.A. 25a-26a.

would now be relevant to determine whether their actions were narrowly tailored to further the purpose of minimizing violence. Also, the burden to refute the officials' justification for the challenged policy lies with the inmate, not the prison officials. *Overton*, 539 U.S. at 132. Because respondents would have a higher evidentiary threshold and production burden to meet if strict scrutiny applied, it would be equitable to the parties and beneficial to the court below to further develop the evidentiary record.

B. The Practice Advances a Compelling Governmental Interest.

If this Court concludes that *Turner v. Safley* does not apply in this case, and if it finds that remand is not appropriate, the prison's practice would still satisfy strict scrutiny. When race-based action is necessary to further a compelling governmental interest, such action does not violate equal protection so long as the action is narrowly tailored to the governmental interest. *Grutter v. Bollinger*, 539 U.S. at 327.

All states have a compelling interest in maintaining the order and security of their prisons. See, *e.g.*, *Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."). There is no evidence that the CDC's practice is done for any other reason than to further prison security and for the safety of the inmates and staff. The question here is whether the CDC's practice is narrowly tailored to further that compelling interest.

C. The Practice is Narrowly Tailored.

When analyzing whether a race-conscious decision is narrowly tailored, "the inquiry must be calibrated to fit the distinct issues raised." *Grutter*, 539 U.S. at 333-34. The very specific issue here is the propriety of making a race-conscious decision, which generally will only impact the inmate for a maximum of sixty days, and sometimes for as few as fourteen days, in order to protect inmates' and staff members' safety.

In order to pass constitutional muster, a race-conscious practice must "not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. As previously discussed, this short-term practice applies to every inmate regardless of race; no benefit is conferred nor burden is suffered by any particular race; no specific cells are set aside for any race; and all other aspects of prison life – jobs, meals, and the like – are race neutral. Safety is the primary consideration in the celling process, not the race *per se* of any inmate. It is only the race of the inmate as compared to his prospective cellmate and the potential ensuing hostility from as-yet unknown gang affiliations that is examined.

The *Grutter* Court's opinion also emphasized that an equal protection claim must be analyzed in relation to the specific circumstances under which it arises: "Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use

of race in that particular context." 539 U.S. at 327 (internal citations omitted). In *Grutter*, the Court applied strict scrutiny while deferring to school officials' decisions and "taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* at 328. Deference in the prison context is at least as critical as in the university setting. Prison is a hostile environment populated by felons – many of whom are murderers – where the prevention of violence is a paramount concern. Managing the complex interaction between inmates with histories of anti-social behavior who are housed together in small, confined cells is a formidable task. Add race-based rivalries and gang affiliations to the brew and the cauldron fairly boils over. The expertise of officials in assessing the risk of danger at the reception centers and exercising caution in their practices until they can make more informed decisions should not be taken lightly.

Amicus former state corrections officials criticize respondents' practices based on studies conducted by Trulson and Marquart after compulsory integration of the Texas Prison System. Those studies, however, examined double-celling only after initial screening and background investigation were completed on the respective cellmates. Notably, the initial diagnostic facilities – Texas's equivalent of California's reception centers – were not required to be integrated at the cell level. See Chad Trulson, James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 LAW & SOC'Y REV. 743, 753 n.13 (2002). Moreover, there is other relevant evidence that "uninformed" compulsory integration in initial receiving facilities can cause an eruption of serious violence. See *White v. Morris*, 832

F. Supp. at 1130 (during negotiations to end Ohio prison riot, and after, inmates repeatedly cited integrated celling as factor contributing to tense atmosphere).

Even under the Texas consent decree and subsequent court orders, the prisons could still take race into account when making permanent housing cell assignments if a particular inmate had been found to be ineligible to share a cell with an inmate of a different race. For instance, if the inmate were a confirmed member of a gang that divided along racial and ethnic lines or if he had previous race-related problems in prison (defined as three racially motivated incidents in the past two years), he would be ineligible for cross-racial double-celling. See Trulson, *supra* at 755. But here, that information is not available upon the inmate's initial entry into the system.

California's practice of celling inmates of the same race together in the reception centers is simply the officials' first cut at separating potentially dangerous enemies from one another. There is no presumption that inmates of one race or another are, in fact, members of a gang. It only makes sense, though, to assume that if one or both of the occupants of a two-man cell *is* a member of a race-based gang, which is generally not known at that point, the cellmates will be likely to engage in cross-racial violence.

If the officials had all of the necessary information to assess the inmates' violence potential when the inmates arrived, perhaps a different practice could be used. But unlike the federal system, where the inmates generally are in federal custody from the moment they are arrested, state inmates are in county custody until they are convicted and later transferred to the custody of the CDC.

And unlike the federal Bureau of Prisons, which can pre-screen its prisoners before they arrive at its prisons, the CDC has no such opportunity.[17] The counties are under no obligation to pre-screen state inmates, and, in fact, the counties are only required to provide the inmates' abstracts of judgments and criminal identification numbers, and proof that they are medically fit to be transported. Cal. Penal Code § 1216. The CDC cannot feasibly pre-screen the inmates either. The CDC receives inmates from all of California's fifty-eight counties and it would be impossible at current staffing levels for the CDC to send its classification, medical, and psychiatric personnel to every one of the hundreds of county facilities to conduct pre-commitment screening procedures. There is no other viable way for the CDC to have all of the necessary information to safely double-cell inmates of different races when they arrive at the reception centers.

In sum, viewing the specific context of the CDC's practice, as *Grutter* requires, shows that the practice is brief, indiscriminate, and narrowly tailored to fit the compelling interest of preventing violence in prison.

---

[17] And, unlike the BOP's population, 54 percent of whom are incarcerated for drug offenses and only 3.2 percent for murder, aggravated assault, or kidnapping, the CDC's population is comprised of far more violent offenders, 22 percent of whom are incarcerated for homicide, assault with a deadly weapon, or kidnapping. See Bureau of Prisons, Quick Facts, available at http://www.bop.gov/; California Dep't of Corrections, California Prisoners and Parolees 2002 tbl. 9, available at http://www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/CalPris/CALPRISd2002.pdf

IV.

REGARDLESS OF WHAT STANDARD APPLIES, RESPONDENTS GOMEZ AND ROWLAND ARE ENTITLED TO QUALIFIED IMMUNITY.

Constitutional requirements are not always clear-cut at the time that action is required by officials. *Saucier v. Katz*, 533 U.S. at 205-06. But qualified immunity ensures that officials are on notice that their conduct is unlawful before they are subjected to suit. *Id.* It therefore prevents officials from being distracted from their governmental duties or inhibited from taking necessary discretionary action. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). It also prevents "deterrence of able people from public service." *Id.* And in reference to prisons, it allows officials to utilize their expertise – based on years of observation and practice – to maintain order without fear of liability for doing what seemed reasonable at the time.

In *Saucier v. Katz*, this Court explained that an official is entitled to qualified immunity unless: (1) the plaintiff alleged facts that show a constitutional violation and (2) it was clearly established, at the time, that the conduct was unconstitutional. 533 U.S. at 201. As discussed above and as the Ninth Circuit held, respondents' actions did not violate equal protection. Nevertheless, even if this Court were to disagree and rule that the petitioner has proven a constitutional violation, the state of the law and what constitutional standard applied were unsettled when the officials acted. For these reasons, respondents Gomez and Rowland are entitled to qualified immunity from damages.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: August 6, 2004

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No. 03-636

SEP 10 2004

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTRODUCTION

Respondents urge this Court to uphold a policy of routine racial segregation that has persisted in the California prison system longer than anyone can remember. This Court should decline that invitation and, instead, reaffirm the right of all individuals to be free from racial discrimination absent "particularized circumstances" that demand extraordinary measures to preserve security.

Respondents and their amici attempt to reinvent the record below to defend California's racial segregation policy. Petitioner Garrison Johnson ("Johnson") does not dispute that violence occurs in prisons, that some prisoners act violently, or that the violence in prisons occurs both between persons of different skin color or ethnicity and between persons of the same skin color or ethnicity. But Respondents submitted no evidence whatsoever that the behavior of incoming and transferred prisoners is preordained by race. Nor did Respondents submit any evidence that any group of prisoners – much less every group of prisoners – suffers disproportionate violence from members of *different* "ethnic race[s]" than they do from members of their "same ethnic race[s]" (Resp. Opp. Cert. 2), or that racial segregation of all incoming and transferred inmates is necessary to reduce such violence. Absent any evidence that interracial violence is disproportionately greater than *intra*racial violence (for every "ethnic race"), that interracial violence necessarily arises from racial hostility, and that racial segregation in initial cell assignments is necessary for prison security and discipline, Respondents' policy cannot be sustained.

Moreover, not a single jurisdiction, including the eight states that have filed an amicus brief in Respondents' support, find a policy like California's necessary. Despite having maintained its segregation policy for more than a quarter of a century, and, as Respondents concede, perhaps for as long as "a hundred years," California has not adduced a single study, statistic, or fact that demonstrates or even suggests that the policy is other

than what it appears to be – a reflexive and never-considered response, rooted in racial stereotypes.

On the record in this case, the California Department of Corrections' ("CDC") "justification" for its segregation policy is precisely the justification once offered to support segregation in the United States military, in schools, and in parks – that "we know" there will be violence, or riots, or worse. The Equal Protection Clause, and *Lee v. Washington*, 390 U.S. 333 (1968), require far more.

I. This Case Squarely Challenges California's Policy Of Segregating All Male Inmates By Race In Two-Man Cells Upon Arrival And Transfer

Petitioner never waived his challenge to segregation of two man cells upon each institutional transfer of inmates. In fact, he firmly stated it. Respondents admit that more than 350,000 inmates were segregated by race in reception centers in 2003 alone. Resp. Br. 6.[1] Of those, fewer than 15 percent were newly admitted inmates regarding whom the CDC claims to have "only limited information." *Id.*[2] "[A]ccording to the CDC, the chances of an inmate [whether newly imprisoned or being transferred] being assigned a cell mate of another race is '[p]retty close' to zero percent." Pet. App. 3a; *see also* J.A. 207a (CDC Form

1. The entire population of male inmates at the CDC institutions and camps as of December 31, 2003, was 144,548. California Department of Corrections, *Weekly Report of Population as of Midnight December 31, 2003, available at* http://www.corr.ca.gov/OffenderInfoServices/Reports/WeeklyWed/TPOP1A/TPOP1Ad031231.pdf.

2. As discussed below, Section III.B. *infra*, the CDC's claim that they have "only limited information" regarding newly admitted inmates is inconsistent with the requirement of the California Penal Code that a presentence report be prepared for every such inmate for use "by the Department of Corrections in deciding upon the type of facility and program in which to place a defendant. . . ." Cal. Rules of Court, Criminal Cases, rule 4.411(d) (West 2004).

136).[3] That policy was applied to Petitioner on his initial imprisonment and again upon each transfer. Respondents cannot avoid their obligation to justify their policy with respect to the 85 percent of prisoners racially segregated in reception centers for whom they already have both the results of the initial classification study (J.A. 303a-305a) and subsequent CDC records.

Respondents' argument that Johnson has "'explicitly disavowed' any challenge to the transfer policy" (at 10 n.7, 12 n.9, 14) is belied by both the Ninth Circuit's opinion *and* the

3. Nor does the record support Respondents' argument that the CDC looks to a variety of factors in making housing placements within the reception centers. Resp. Br. 8. To the contrary,

> when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. . . . After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement.

J.A. 305a (Declaration of Steven Cambra, former acting Director of the CDC); *see also* J.A. 309a (Declaration of Associate Warden L. Schulteis) ("If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of his same ethnic race."). Respondents' statement (at 9) that "reception center inmates may cell with inmates of other races, upon request, if the inmates provide information that they are compatible" is not supported by the record, which reflects no more than that one of the CDC administrators could recall only a single occasion where a Hispanic inmate had initially been housed in the reception center with another Hispanic inmate and was at some point in time allowed to house with a black inmate because he informed the CDC that he had been raised with Crips. J.A. 183a-184a.

oral argument it expressly relied on.[4] The Ninth Circuit's opinion noted that:

> The parties . . . no longer contend that the *aftermath* of the 60-day policy is relevant; Johnson's counsel at oral argument explicitly disavowed any challenge to the *continuing effects of the CDC's housing policy and limited the challenge only to the 60-day policy itself.* Thus, the only question before this court is whether the CDC's use of race to make the temporary 60-day housing decision violates the Equal Protection Clause.

Pet. App. 6a n.2 (emphasis added). The "60-day policy" identified in the court's footnote is the *policy applied at admission and again whenever an inmate is transferred. See, e.g.*, Pet. App. 4a-5a ("If the inmate is transferred, he again goes through the initial housing screening process."). At oral argument before the Ninth Circuit, Johnson's counsel made clear that Petitioner was challenging the 60-day policy as applied on admission *and* upon transfer:

> THE COURT: . . . But you are not arguing that there is a permanent segregation, that after 60 days, no matter what, they would still be segregated into two-person cells, are you?
>
> MS. FORSHEIT: After 60 days, after the classification process, they are evaluated on a number of criteria, including psychological evaluation, custody level; and at that point they try to place the inmate with someone with whom they believe they are compatible. And the inmate may also request placement with a particular inmate.

4. Not only was the challenge to the transfer policy not waived below, but it was plainly raised in the Petition for Writ of Certiorari (at 2, 3, and 4). Respondents never contended in their brief in Opposition that the issue was not squarely presented and explicitly acknowledged that the policy applies to transferred inmates. Resp. Opp. Cert. 1-2.

> However, at the –
>
> THE COURT: But you are not arguing racial discrimination after the 60-day classification.
>
> MS. FORSHEIT: That's correct.
>
> THE COURT: All right.
>
> MS. FORSHEIT: The initial 60-day –
>
> THE COURT: Okay. I just want to be sure what our target is here.
>
> MS. FORSHEIT: Absolutely. The initial 60-day reception center; *and then when they are transferred to another prison, the same process is underway. And Mr. Johnson has been transferred, I believe, at least two or three times. At each stage of the process he has been classified according to race.*

Excerpts from Transcription of Audiotape of Hearing before the United States Court of Appeals for the Ninth Circuit held on October 10, 2002, Addendum, 1a-2a, *infra* (emphasis added).[5]

5. Respondents' further argument (at 10 & n.7) that they actually complete the classification of transferred inmates already in the system within 14, not 60, days, invoking section 62010.8.3 of the CDC's Departmental Operations Manual ("DOM"), is both unsupported in the record and beside the point. The policy expressly permits segregation for up to 60 days and the inmates are actually segregated for a prolonged time. J.A. 245a.

Section 62010.8.3 of the DOM, on which Respondents rely (at 10 n.7), says only that "[e]ach institution shall establish an initial classification committee to review and initiate a suitable program for each inmate within 14 days after arrival at the institution[,]" not that the inmate will be classified and placed within that fourteen day period. As is made clear by the remainder of section 62010.8.3, the committee is only charged with the following:

> initiat[ing] an educational, vocational training, or work program and privilege group designation[; e]valuat[ing]

(Cont'd)

II. This Court Should Not Craft A Prison Exception To Its Longstanding Race Jurisprudence Holding That All Racial Classifications Must Be Subject To Strict Scrutiny

Strict scrutiny is required here by the Court's frequent, recent, and carefully considered holdings that "*all* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny'" (*see* Pet. Br. 15 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)), a standard that contrasts sharply with the standard of *Turner v. Safley*, 482 U.S. 78 (1987), which even the Respondents concede has not been applied to all constitutional claims (*e.g.*, not to those bottomed on the Eighth or Fifth Amendments).[6] Strict scrutiny is required as well by *Lee v. Washington*, 390 U.S. 333, 334 (1968), part of the post-*Brown v. Board of Education*, 347 U.S. 483 (1954), line of cases that the Court and commentators have overwhelmingly understood as requiring strict scrutiny (despite the absence of those words).[7] Moreover, if there were any doubt,

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> case factors and assist[ing] the inmate to understand institution expectations, available programs, and resources[; d]esignat[ing] the degree of custody necessary to control the inmate[; r]eferr[ing] complex cases to the ICC[; r]ecommend[ing] transfer of a new arrival determined to be inappropriately placed[; and g]rant[ing] worktime credits to which the inmate is entitled while in transit.

None of the CDC's declarants stated that transferred inmates are actually classified within 14 days of arrival at the new institution, or housed in accordance with any such prompt classifications, and Johnson was not.

6. Resp. Br. 22-23; *see also, e.g.*, Pet. Br. 29-30, U.S. Br. 15-16, and ACLU Br. 17-21.

7. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citing post-*Brown per curiam* decisions for the proposition that "the State may not, absent extraordinary justification, segregate citizens on the basis of race"); Christopher E. Smith, *Courts and the Poor* 85 (1991)

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the *Lee* Court eliminated it by its holding that "[r]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the *necessities* of prison security and discipline." *See* Pet. Br. 20 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)). A standard that bars discrimination save for "the necessities of prison security and discipline" evokes strict scrutiny, not *Turner*. Permitting discrimination only where shown to be "necessary" is precisely what strict scrutiny entails, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (race-based action will survive strict scrutiny only if shown "necessary to further a compelling interest"), and is far more exacting than *Turner*, which is a test looking merely to rationality, not demonstrated necessity. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003); *McKune v. Lile*, 536 U.S. 24, 37 (2002); *Washington v. Harper*, 494 U.S. 210, 226 (1990); *Turner*, 482 U.S. at 89.

It makes no difference that the Court's short *per curiam* opinion in *Lee* did not label its standard of review "strict scrutiny"; the same is true of *Brown*, 347 U.S. 483, itself, and of such subsequent cases as *New Orleans City Park Improvement Association v. Detiege*, 358 U.S. 54 (1958) (*per curiam*), *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*), *Holmes v. Atlanta*, 350 U.S. 879 (1955) (*per curiam*), and *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (*per curiam*), all of which have long been understood as having applied and required strict scrutiny. *See Miller*, 515 U.S. at 911 (citing cases). Having held strict scrutiny applicable to race classifications long before *Lee*, and having voiced no intent to alter the standard of review first articulated in *Korematsu v. United States*, 323 U.S. 214 (1944), it follows that the Court applied nothing less to the

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("The Supreme Court applied strict scrutiny to discriminatory racial classifications after *Brown v. Board of Education*. . . ."); Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. Miami L. Rev. 107, 125 (1990) (application of strict scrutiny "finally culminat[ed] in *Brown v. Board of Education*").

racial segregation of prison inmates when the Court decided *Lee*. This understanding is manifest in the published decisions of numerous courts applying *Lee* accordingly. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987); *Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999); *Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993).

The Court's usual deference to prison authorities does nothing to buttress the CDC's request for extraordinary deference to its use of racial classifications. This Court has demonstrated emphatically that the deference traditionally paid to coordinate branches of government gives way when racial classifications are involved (*Adarand*, 515 U.S. at 227-31), precisely because the wide governmental power conferred (or recognized) by the Constitution generally excludes the power to govern through racially discriminatory laws. The "inherently suspect" nature of racial classifications is understood to trigger "the most exacting judicial examination," regardless of the beneficence or gravity of its purported purpose. *Miller*, 515 U.S. at 904 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)).

The Court has required such scrutiny because racial classifications are "more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Having concluded that racial classification is offensive to individual dignity and that "racial discrimination is by definition invidious discrimination," *Fullilove v. Klutznick*, 448 U.S. 448, 526 (1980) (Stewart J., joined by Rehnquist, J., dissenting), the Court has explicitly required since *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that *every* governmental apportionment of burden, benefit, or regulation using race is permissible, if at all, only if the government can carry its heavy burden of demonstrating

that the use is necessary and narrowly tailored to achieve compelling governmental objectives. *Grutter*, 539 U.S. at 327.[8]

The CDC attempts to avoid strict scrutiny by asserting that the harms that arise from its racial classification and segregation fall equally on inmates of all races.[9] Resp. Br. 16. That approach

8. Amicus curiae the State of Utah, joined by seven other states (the "State Amici"), attempt to distinguish this case from recent racial equal protection cases focused on affirmative action on the ground that California's purpose here is assertedly "benign" or serves a legitimate interest. State Amici Br. 14-15. But while California's ultimate goal may be the benign and legitimate one of preventing violence, that purpose is no more "benign" or legitimate than were the goals of California in *Bakke* and Michigan in *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003) – in all of which strict scrutiny was applied. In any event, it is long settled that the threat of racial violence cannot justify racial discrimination. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Buchanan v. Warley*, 245 U.S. 60 (1917).

9. Mischaracterizing its practice as a fully protective undertaking not only wrongly deprives Johnson of the benefit of the inference that the intentional racial segregation was in fact invidious, but also disregards the further harm that Johnson has alleged, *i.e.*, that the CDC's segregation exacerbates and breeds racial animosity and tension and contributes to riots to which he is vulnerable. J.A. 164a-166a. Johnson's allegations echo the recognition of a California court that the CDC's racial segregation of inmates fosters a dangerous "'*culture of separation.*'" M.S. Enkoji, *Judge: Race-based lockdowns are illegal*, The Sacramento Bee, Dec. 21, 2002, at A1 (emphasis added). Hence, in late 2002, a Superior Court judge ordered the CDC to cease lockdown assignments based on race at Pelican Bay State Prison, agreeing that the practice could not be justified two years after the riot that precipitated the action, and that such determinations had to be made with respect to "the inmate's own past behavior, not on an assumption that he is aligned with a gang and prone to violence because of his race. . . ." *Id.*

That all other aspects of prison life outside of reception center housing may not be officially segregated fails to alter the reality that inmates are racially segregated most of the time they are in the reception centers, the gateway to the larger prison system. Prisons in California remain racially segregated in spite of *Lee*. *See* Human Rights Watch,

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was rejected when *Plessy v. Ferguson*, 163 U.S. 537 (1896), was overruled, and has been repeatedly rejected subsequently. Pet. Br. 19. "[I]t is beyond any serious dispute that [the distinction between government classifications that specifically favor or harm a group and those that apply equally] is utterly bereft of force in the post-*Croson*, post-*Adarand* world – where our focus is on the use of classifications *per se*. . . ." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 377 F.3d 949, 980 n.40 (9th Cir. 2004) (O'Scannlain, J., for the court). Racial classifications, no matter how equally applied, risk "breed[ing] deep seated cross-racial resentment and do violence to the constitutional principle that 'we are one race here. It is American.'" *Id.*, 977 F.3d at 987 (quoting *Adarand*, 515 U.S. at 239 (Scalia, J., concurring)). The Court therefore strictly scrutinizes all racial classifications because "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution.'" *Miller*, 515 U.S. at 912 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) (citation omitted)).

The rule challenged here violates the "central mandate [of the Equal Protection Clause, namely] racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904. Government use of race is inherently suspect, regardless of asserted harms or benefits. For example, reiterating that "laws

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No Escape, Male Rape in U.S. Prisons, Chapter II, *available at* http://www.hrw.org/reports/2001/prison/report2.html ("A Supreme Court decision banned the practice in 1968, but nonetheless many penal facilities continue to separate inmates by race, sometimes relying on surrogate variables such as gang affiliation or following inmate preferences for self-segregation.") (citing Daniel B. Wood, *To Keep Peace, Prisons Allow Race to Rule*, Christian Science Monitor, Sept. 16, 1997 (describing how in California prisons "nearly every activity – sleep, exercise, and meals – is determined by race")).

that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition[,]" the Court has invalidated legislative redistricting plans where race was the predominant factor in the districting determination. *Miller*, 515 U.S. at 905 (quoting *Shaw v. Reno*, 509 U.S. 630 (1993)) (alteration in original). Strict scrutiny was applied in both *Shaw* and *Miller* not because of any vote dilution or other differential harm, but because "the essence of the equal protection claim recognized … [was] that the State ha[d] used race as a basis for separating" citizens. *Miller*, 515 U.S. at 911 (discussing *Shaw*).

The *Lee* formulation of strict scrutiny, generated (unlike *Turner*) in full consideration of the prison context *and* the evils of racial segregation, properly applies to test the CDC's racial segregation policy. Racial segregation in prison is constitutionally prohibited unless prison authorities establish particularized circumstances in which "the necessities of prison security and discipline" require its use.

III. No "Particularized Circumstances" Demonstrate That Respondents' Segregation Policy Is Necessary For Prison Security And Discipline

Respondents did not prove that their practice of racially segregating prisoners in two-person cells is necessary to maintain prison security and discipline. *See Cruz*, 405 U.S. at 321 (citing *Lee*); *see also Lee*, 390 U.S. at 334 (Black, J., concurring) (use of race could be justified, if at all, only by "particularized circumstances" requiring that use of race to maintain security, discipline, and order).

Respondents' policy is not a response to anything in "particular"; to the contrary, it is applied to each and every incoming and transferred male inmate regardless of that inmate's "particularized circumstances." In 2003, that policy was uniformly applied more than 350,000 times. Resp. Br. 6 & n.3. As discussed in Section III.C., *infra*, Respondents' policy is not

even rationally related to the goal of averting racial violence given that, as often as not, gang violence is intraracial, or not shown to be the product of racial tension. Further, Respondents have not identified a single incident of racial violence arising in the cells.[10]

A. None of the Incidents of Racial Violence in California Prisons Identified by Respondents or the Ninth Circuit Resulted From *Intra*-Cell Violence

Not one of the violent incidents identified by Respondents in support of their Motion for Summary Judgment – all of which took place at Pelican Bay State Prison, where Johnson has never

10. Respondents' reliance on *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993) (at 30), is greatly misplaced. In *White*, the court reluctantly agreed to modify a desegregation order *only* in response to a devastating riot that the court found presented "particularized and exigent circumstances." In fact, due to the riot, many of the inmate records, including security information, were destroyed. Accordingly, the *White* court felt it necessary to implement such emergency procedures to preserve security after the riot. *Id.* at 1131. It modified the desegregation order with a very strict instruction that the facility resume desegregated housing as soon as feasible. In ordering a limited policy of segregated celling, the *White* court took great pains to reject arguments relied upon by the prison officials in that case:

> [T]his Court is in no way approving of, or putting its imprimatur on, invidious, state-sanctioned, race-based, discrimination. The Court has, with great difficulty and reluctance, reached the above conclusions [to allow segregated housing for a temporary period], in light of the *particularized and exigent circumstances* of this case, and the applicable law as interpreted by the United States Supreme Court. A conclusion drawn from a reading of this Order to the effect that the Court in any way approves of, or considers at all acceptable, invidious discrimination, which has blemished this nation's otherwise proud history, has utterly missed the meaning, purpose, limitations and necessity of this Order.

Id. at 1137 (emphasis added).

been housed – stemmed from an incident within a cell. J.A. 296a-301a. Further, as explained in Johnson's Opening Brief, Pelican Bay State Prison is designed for the most notoriously violent convicts. Pet. Br. 5-6. The other incidents identified by the Ninth Circuit (Pet. App. 16-18a n.9, cited at Resp. Br. 4, 30) are based on press reports of riots at CDC facilities that *did not occur or begin in the cells*.[11] Nor did they occur in reception centers.

Moreover, Respondents' integration of the prison exercise yards (Resp. Br. 9 n.6) is entirely inconsistent with their defense of the segregated cells. As a CDC spokesperson has explained, "'We as a society are integrated. If these people are going back to society, they have to be able to live with other groups.'"

11. *See Racial fight erupts at prison*, San Diego Union-Tribune, Mar. 3, 2000, at A3 ("The fight stemmed from racial tension, *but it was unclear what specific act triggered the attack*, said a prison official.") (emphasis added); Sue Fox, *Lancaster Prison Locked Down After Riot Hurts 10*, Los Angeles Times, Aug. 9, 2000, at B2 ("A maximum-security area . . . at the California State Prison in Lancaster remains locked down as authorities try to learn the cause of a brawl there. . . . The violence erupted . . . in an *outdoor exercise yard* when large groups of Latino and white inmates 'rushed toward each other' and began fighting. . . .") (emphasis added); Jeff Barnard, *Racial fights an inescapable fact of prison life*, San Diego Union-Tribune, Feb. 26, 2000, at A3 ("When 200 inmates stepped out of their concrete cellblocks onto a grassy *exercise yard* at Pelican Bay State Prison this week, many came ready to fight. . . .") (emphasis added); Ben Goad, *Race riot hits Adelanto prison: More than 100 men are moved out of the private facility*, The Press-Enterprise, Mar. 3, 2000, at B1 ("Thursday's insubordination, sparked by Wednesday's fisticuffs, involved the refusal of dozens of inmates to leave the *dining area* of the facility. . . .") (emphasis added); *Riot in Calif. Prison, 1 Dead*, Los Angeles Times, Sept. 28, 1996, at A12 ("A fight between 100 black and Latino inmates in an *exercise yard* at Folsom state prison yesterday led to the death of one prisoner and injuries to 13 others.") (emphasis added). One of the incidents cited in the Ninth Circuit's opinion, relied upon by Respondents, occurred in a Los Angeles County jail not run by the CDC. *See 80 Inmates Hurt In Calif. Jail Brawl*, Newsday, Jan. 11, 1994, at 17.

Steve Gessinger, *Violence Mounts As Racial Gangs War in Prisons*, Los Angeles Sentinel, Mar. 25, 1998, at 1, cited at Pet. App. 16-18a n.9 (quoting Christine May, CDC spokesperson).

To the extent that there have been reports of interracial violence in those yards, it has been found due in large measure to guard misconduct. *See, e.g., Robinson v. Prunty*, 249 F.3d 862, 867 (9th Cir. 2001) (finding deliberate indifference claim sufficient based in part on allegations that California prison guards set up "gladiator-like" conflicts between inmates – already segregated from the rest of the prison for violating prison rules – of different races and who had known racial animosities); Gessinger, *supra* ("Fights happen, but it's worse now that a federal grand jury investigating another prison has accused guards of intentionally setting the prisoners up for gladiator-like fights – putting known enemies together in the yard.").

B. Respondents Have Sufficient Information to Safely House Both Transferred Prisoners and Even New Prisoners Within Reception Centers Without Resort to Race

Respondents maintain that they must make initial housing determinations with "only limited information" (Resp. Br. 6, 43). However, Respondents concede that more than 85 percent of the 350,000 male inmates received or transferred last year were racially segregated, *even though they had previously been housed by the CDC* (Resp. Br. 6) and had therefore already been evaluated, classified, and observed by the CDC in actual cell assignments. The incarceration records of those inmates certainly must have been available to permit the CDC to evaluate cell assignments without resort to race.[12]

12. The statements of the CDC's witnesses also directly contradict Respondents' assertions the CDC lacks any race-neutral indicia of gang affiliation. Linda Schulteis, the Associate Warden of California State Prison – Lancaster, who submitted one of the only two declarations on which Respondents rely, testified in deposition that gang members "will identify themselves by the way they cut their hair," by the clothes they wear, and even by the color of the pens they use. J.A. 184a.

With respect to the newly admitted inmates who comprise fewer than 15 percent of annual admissions, Respondents' claim that they receive only minimal information from county jails (Resp. Br. 6, 43 (citing Cal. Penal Code § 1216 (West 2004))) is contrary to the California Penal Code and Rules of Court. Following conviction but before sentencing to prison, a probation officer evaluates a defendant to produce a presentencing report that will follow the convict to the CDC. Indeed, Penal Code § 1203c *requires* a presentence report on every person sentenced to prison for use not only by judges, but "by the Department of Corrections in deciding upon the type of facility and program in which to place a defendant. . . ." Cal. Rules of Court, Criminal Cases, rule 4.411(d) (West 2004). A presentence investigation and report are called for by the California Rules of Court expressly to facilitate compliance with Penal Code § 1203c, which mandates:

> Notwithstanding any other provisions of law, whenever a person is committed to an institution under the jurisdiction of the Department of Corrections, whether probation has been applied for or not . . . *it shall be the duty of the probation officer of the county from which the person is committed to send to the Department of Corrections a report upon the circumstances surrounding the offense and the prior record and history of the defendant* as may be required by the Administrator of the Youth and Adult Corrections Agency. *These reports shall accompany the commitment papers*.

Cal. Penal Code § 1203c (West 2004) (emphasis added). *See also* J.A. 259a (Petitioner's Institutional Staff Recommendation Summary, including as sources probation officer's reports dated February 21, 1986, June 9, 1986, and March 24, 1987, prepared months before Petitioner's arrival at the CDC).

C. The High Probability of Intraracial Violence Between and Among Gang-Affiliated and Non-Gang-Affiliated Inmates Shows Respondents' Policy to Be Unwarranted and Indeed Perverse

Respondents argue that "[i]t is widely recognized that prison gangs are formed and organized along racial lines." Resp. Br. 4. But they made no showing whatsoever that most prison crime is interracial, that most interracial prison violence is the product of racial hostility, or that leading gangs are without antagonism to all members of the same race. *See* Alejandro A. Alonso, *African-American Street Gangs in Los Angeles*, National Alliance of Gang Invest. Ass'n (1998), *available at* http://www.nagia.org/Crips_and_Bloods.htm (cited at Resp. Br. 11 n.8) (noting conflict between Bloods and Crips). Even if Respondents had provided evidence of the rates of interracial prison violence, interracial violence is a necessary, but certainly not sufficient, premise from which to conclude that violent incidents are racially motivated.

Statistics show that, contrary to Respondents' blanket assertions, "most crime is intraracial. More than 80 percent of homicides where we know the race of the killer are either white-on-white or black-on-black. Research among Vietnamese and Chinese in California has also shown that most crime there is intraracial." Christopher Stone, *Race, Crime, and the Administration of Justice*, Nat'l Inst. Justice J., Apr. 1999, at 26-32. "From 1976-2000, according to [the Bureau of Justice Statistics], '86 percent of white victims were killed by whites; 94 percent of black victims were killed by blacks.'" Frank J. Murray, *Murder hits 40-year low*, Washington Times, Oct. 5, 2003, at A1, *available at* 2003 WL 7720408. *See also* Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States, 1995*, Section II, at 14 ("Murder is most frequently intraracial among victims and offenders. In 1995, data based on incidents involving one victim and one offender showed that 94 percent of the black

murder victims were slain by black offenders, and 84 percent of the white murder victims were killed by white offenders."); *Banning Racial Profiling: Hearing on S. 989 Before the Senate Subcomm. on the Constitution, Federalism, and Property Rights*, 107th Cong. 24-77 (2001) (statement of Steve Young, National Vice President Fraternal Order of Police) ("Most violent crime is intraracial – more than 80 percent of homicides where we know the race of the killer are either white-on-white or black-on-black crimes.").

These statistics do not change when the homicides are gang-related. A study regarding gang-related homicides in Los Angeles County found that "[i]ntraracial homicides accounted for . . . 82.2% . . . in which the race of both the victim and perpetrator were known." H. Range Hutson, M.D., *et al.*, *The Epidemic of Gang-Related Homicides in Los Angeles County From 1979 Through 1994*, 274 JAMA 1031, 1033 (1995).

Counsel for Respondents admitted at oral argument before the Ninth Circuit that the CDC's policy does nothing to avoid – and may even facilitate – potential conflicts between inmates of the same race that are in rival gangs:

> THE COURT: But lots of times you will have persons of the same race, say African-American, that are in rival gangs.
>
> MS. TURNER: That's true.
>
> THE COURT: That would even be worse, wouldn't it?
>
> MS. TURNER: . . . [T]hat's absolutely true. Certainly the Hispanic gang – the Hispanic gang, if you were to say, maybe, the Mexican Mafia gang, you have northern and southern, but they're still, you know, two different factions of that gang. . . . And there can be conflicts.

See Addendum, 2a-3a, *infra*.

D. Respondents Admit They Have Never Considered Whether Ready Alternatives to Their Segregation Policy Exist

Even if the "particularized circumstances" establishing necessity were identical to the *Turner* standard's examination of whether there are ready, obvious alternatives to the challenged policy (Resp. Br. 26-27), Respondents' policy would nonetheless fail. That the Federal Bureau of Prisons and, evidently, all other 49 states manage to operate their prisons without California's express, intentional racial discrimination makes plain that Respondents could maintain prison safety with a host of ready, obvious alternatives. That California has not tried any such alternatives in any of its institutions, even on a trial basis – apparently for as long as 100 years (*see* Addendum, 3a, *infra*) – does not suggest that they do not exist, only that racial discrimination in the CDC is persistent and unexamined.

Respondents are surely correct that "[a]ll states have a compelling interest in maintaining the order and security of their prisons" (Resp. Br. 39), but not a single state other than California advances that interest with routine racial segregation. The Court is familiar with the solidarity of the states when it comes to supporting state policies threatened before this Court; if other states relied on the rule challenged here they would have said so. Even the United States, with a massive nationwide prison system to operate, has weighed in against Respondents for violating their obligations under the Equal Protection Clause.

The lack of foundation for Respondents' position is apparent in their statement that "[i]t only makes sense . . . to assume that if one or both of the occupants of a two-man cell *is* a member of a race-based gang, which is generally not known at that point, the cellmates will be likely to engage in cross-racial violence." Resp. Br. 42 (emphasis in original). As demonstrated in Johnson's Opening Brief and above, there is nothing in the record to support Respondents' multiple assumptions that all or most incoming prisoners are members of race-based gangs,[13] that all or most incoming prisoners will engage in interracial violence, regardless of gang affiliation, or that most violence in prison is interracial, rather than intraracial.

Without the slightest evidence that their blanket segregation policy is narrowly tailored to meet their interest in preserving prison security, Respondents instead argue that, should the Court subject their policy to strict scrutiny, they are entitled to a "do-over" on remand (Resp. Br. 37-38). But the Ninth Circuit's first decision, its reversal of the district court's original dismissal in March 2000, left an equal protection claim to litigate, expressly bottomed on *Lee* and *Cruz* and their reference to presumptive unconstitutionality unless justified by "'the *necessities* of prison security and discipline.'" *Cruz*, 405 U.S. at 321 (quoting *Lee*, 390 U.S. at 334) (emphasis added).

Respondents had a full and fair opportunity to present all information on which they wanted to rely (almost all of which was and is in Respondents' possession). Contrary to Respondents' suggestion (Resp. Br. 12-13), nothing in the Ninth Circuit's original decision (207 F.3d 650, J.A. 158a-168a) misled the state concerning the standard of review, much less provided any assurance that the relaxed *Turner* standard would apply; and Respondents' motion for summary judgment presumably compelled the Attorney General to collect the existing evidence on which the Respondents could rely in seeking to uphold the policy against an equal protection attack. Indeed, the Ninth Circuit's decision put Respondents on plain notice that strict scrutiny would (or might well) apply by holding that "'racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of

13. In fact, the statistics relied upon by State Amici indicate that the gang members are a minority among state inmates. *See* State Amici Brief at 17, citing National Gang Crime Research Center, *Gang Resources* 1, *at* http://www.ncjrs.org/gangs/summary.html (in 1999, state correctional facilities believed that fewer than 25 percent of adult state prison inmates were gang members).

prison security and discipline.'" J.A. 164a (quoting *Cruz*, 405 U.S. at 321 (quoting *Lee*, 390 U.S. at 334)). The "necessities" standard necessarily suggests strict scrutiny, not rational relationship. *See, e.g., Grutter*, 539 U.S. at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").

Respondents were free to defend their unique practice with whatever facts, studies, or witnesses might have supported it.[14] The fact is that no such support exists. Respondents are not entitled to a second chance to attempt to defend – and thereby prolong – their constitutionally defective housing practices.

CONCLUSION

The issue of qualified immunity is not before this Court. For all of the foregoing reasons, and those set forth in his Opening Brief, Johnson respectfully requests that this Court reverse the opinion below and find that California's practice of routine racial segregation of incoming and transferred state prisoners violates the Equal Protection Clause.

14 The CDC identified Warden Schulteis and Former CDC Director Cambra as the persons most knowledgeable about its policies and practices, pursuant to Fed. R. Civ. Pro. 30(b)(6). Presumably no one could have presented better evidence than they did.

Respectfully submitted,

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ADDENDUM — EXCERPTS FROM TRANSCRIPTION OF AUDIOTAPE OF HEARING HELD ON OCTOBER 10, 2002 3:20-4:18; 13:15-14:4; 15:22-16:11

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ninth Circuit No. 01-56436
D.C. No. CV 95-1192-CBM

GARRISON S. JOHNSON,

Appellant,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Appellees.

Hearing held on October 10, 2002

Before Ninth Circuit Judges:
O'Scannlain, Hug, and Brunetti

Counsel for Appellant: Tanya L. Forsheit
Proskauer Rose LLP

Counsel for Respondents: Sara E. Turner
Office of the Attorney General

* * *

THE COURT: All right. But you are not arguing that there is a permanent segregation, that after 60 days, no matter what, they would still be segregated into two-person cells, are you?

MS. FORSHEIT: After 60 days, after the classification process, they are evaluated on a number of criteria, including psychological evaluation, custody level; and at that point they try

to place the inmate with someone with whom they believe they are compatible. And the inmate may also request placement with a particular inmate. However, at the –

THE COURT: But you are not arguing racial discrimination after the 60-day classification.

MS. FORSHEIT: That's correct.

THE COURT: All right.

MS. FORSHEIT: The initial 60-day –

THE COURT: Okay. I just want to be sure what our target is here.

MS. FORSHEIT: Absolutely. The initial 60-day reception center; and then when they are transferred to another prison, the same process is underway. And Mr. Johnson has been transferred, I believe, at least two or three times. At each stage of the process he has been classified according to race.

* * *

THE COURT: But lots of times you will have persons of the same race, say African-American, that are in rival gangs.

MS. TURNER: That's true.

THE COURT: That would even be worse, wouldn't it?

MS. TURNER: Well, I mean, if the inmates say that they really can't cell together, then they won't cell them together. But that's absolutely true. Certainly the Hispanic gang — the Hispanic gang, if you were to say, maybe, the Mexican Mafia gang, you have northern and southern, but they're still, you know, two different factions of that gang, but they are still

of the same race. And there can be conflicts. And Pelican Bay points it out; that was a big conflict at Pelican Bay, an ongoing one.

* * *

THE COURT: I understand that. So is that an alternative determination? In other words, when they came down with the single cell –

MS. TURNER: Double.

THE COURT: — or two inmates per cell and single race, that was the only alternative in a determination of what was possible?

MS. TURNER: Well, you know, I don't know. Because, as I said, it has been over 25 years. We don't even know when it began. I don't know when it came about. Perhaps when double-cell –

THE COURT: Do we have to look at that issue?

MS. TURNER: Well, it was perhaps when double-celling was first instituted, somebody — it could have been a hundred years ago.

* * * *

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No. 03-636

In the Supreme Court of the United States

GARRISON S. JOHNSON, PETITIONER

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

1. Whether state-imposed racial classifications in prisons are subject to strict scrutiny under the Equal Protection Clause.

2. Whether California's policy of segregating prisoners by race in two-person cells for a minimum of 60 days each time a prisoner enters a new institution violates the Equal Protection Clause.

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INTEREST OF THE UNITED STATES

The United States has an interest in what constitutional standard applies to claims alleging racial discrimination in violation of the Equal Protection Clause in prisons. This Court has held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, proscribes only those racial classifications that would violate the Equal Protection Clause. See, *e.g.*, *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2347 (2003). The Attorney General has enforcement responsibility for Title VI and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d(c), which is modeled after Title VI, with respect to prisons that receive federal financial assistance. In addition, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, authorizes the Attorney General to investigate conditions of confinement in correctional facilities when it is alleged

that prisoners are being deprived of constitutional rights pursuant to a pattern or practice of resistance to the full enjoyment of those rights. Finally, the United States, through the Bureau of Prisons (BOP), is responsible for ensuring compliance with the equal protection component of the Fifth Amendment in the 104 institutions it administers. Regulations governing BOP likewise prohibit racial discrimination in the making of administrative decisions and in the provision of access to work, housing, and programs. 28 C.F.R. 551.90.

STATEMENT

1. Petitioner, Garrison Johnson, is an African-American prisoner in the California Department of Corrections (CDC). He was initially incarcerated in 1987, and, since then, has been housed at a number of different CDC facilities. At each facility, he was double-celled with another African-American inmate. Pet. App. 2a.

All male inmates within the CDC,[1] upon arrival at a CDC institution either as a new inmate or as a transfer from another facility, are initially housed at a reception center for at least 60 days. During that period, inmates undergo a number of evaluations to determine where they should ultimately be placed. To determine inmates' initial double-cell housing placements at the reception center, the CDC looks at a number of factors, including race. Although race is not the sole factor, "it is a dominant factor." Pet. App. 3a. The CDC itself indicated that "the chances of an inmate being assigned

[1] Because petitioner is male, this case addresses only male housing policies. The court of appeals opinion does not indicate whether female inmates are similarly segregated by race. See Pet. App. 2a n.1.

a cell mate of another race [are] '[p]retty close' to zero percent." *Ibid.* Reception center officials further divide inmates within each racial category (black, white, Asian, and "other") by national origin or geography. For example, Asians of Japanese and Chinese descent are generally not housed together, nor are Hispanics from Northern California and Hispanics from Southern California. The CDC claims that race is considered because, in its experience, race is important to inmates and plays a significant role in antisocial behavior. *Id.* at 2a-4a.

Although race is used to determine initial double-cell placements, the rest of the prison is fully integrated. After 60 days at the reception center, the inmate either is assigned a cell within the current institution where he will be permanently housed or is transferred to another institution where his classification indicates that he would be better suited. If the inmate is transferred, he again goes through the initial race-based screening process. If the inmate stays at the institution and has the appropriate security classification, he may be transferred to a dormitory or a single cell or remain in a double cell. Race is not used as a factor in any of those placements, and inmates who remain in double cells are allowed to choose their own cell mate. Within each dormitory, however, the CDC attempts to maintain a racial balance so as to reduce the likelihood of racial violence. Pet. App. 4a-5a.

2. On February 24, 1995, petitioner filed his original complaint *pro se* in the Central District of California, alleging that the CDC's reception center housing policy violated his constitutional rights by assigning inmates' cell mates on the basis of race. In January 1998, the district court dismissed his third amended complaint without leave and petitioner appealed. The Ninth Cir-

cuit reversed, holding that petitioner's allegations were "sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 5a-6a.

On remand, petitioner was appointed counsel and granted leave to amend his complaint. The district court granted summary judgment on behalf of the respondents on the ground that they were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. 6a-7a.

3. a. The court of appeals affirmed. The court held that the constitutionality of the CDC's race-based housing policy should be evaluated under the relaxed, deferential standard of review this Court articulated in *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), rather than the strict scrutiny standard normally applied to government-imposed racial classifications. Pet. App. 8a-13a. The court acknowledged this Court's decision in *Lee* v. *Washington*, 390 U.S. 333 (1968), which held that racial segregation in prisons violates the Equal Protection Clause of the Fourteenth Amendment. It also noted that a three-Justice concurrence in that case recognized that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Pet. App. 9a. The court of appeals, however, refused to apply *Lee*'s presumption of unconstitutionality to the racial classification at issue in this case, explaining that "[i]n 1987, in recognition of the unique circumstances that prisons present, the Supreme Court promulgated a new deferential test for examining the constitutional rights of prisoners [in] *Turner* v. *Safley*." *Id.* at 11a. Under that deferential standard, the court explained, "when a prison regulation impinges on inmates' constitutional

rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 12a (quoting *Turner*, 482 U.S. at 89).

The court further explained that it read *Turner* as at least partially overturning this Court's prior decision in *Lee*. According to the court, "*Turner* was not merely a cosmetic change in the Court's language"; instead, it "ostensibly expanded the definition of 'particularized circumstances' and 'necessary for security and discipline'"—*i.e.*, the limited circumstances that the concurring Justices in *Lee* suggested would be sufficient to justify a race-based prison housing policy—and, more generally, it "lowered the prison administrators' burden to justify race-based policies." Pet. App. 13a. Under *Turner*, therefore, the plaintiff, rather than the prison administrators, bears the "heavy burden" of proving that a race-based prison policy is unconstitutional. *Ibid.* Thus, the court held that "[t]o prevail, [Johnson] must overcome the presumption that the prison officials acted within their 'broad discretion'" in adopting their racial segregation policy. *Ibid.* (citation omitted). The court further held that to the extent that *Turner* and *Lee* "point to divergent paths, we are bound to follow *Turner*." *Ibid.*

In applying *Turner*'s test to the facts of this case, the court of appeals held that the CDC's race-based housing policy was reasonably related to prison administrators' concern about increased violence. Pet. App. 13a-31a. The court emphasized, however, that this was a "close case," in which "the standard of review is paramount." *Id.* at 11a. It acknowledged that there "may be many ways in which to achieve the state's objective in reducing racial violence in the CDC" and that "[i]f this policy were implemented beyond the prison walls, undoubtedly, we would strike it down as unconstitu-

tional." *Id.* at 31a. Nevertheless, it held that "[t]he prison system * * * is inherently different and we must defer our judgment to that of the prison administrators until presented evidence demonstrating the unreasonableness of the administrators' policy." *Ibid.* Here, the court concluded, petitioner "presented little to no evidence and could not rebut the presumption of constitutionality that the [prison] administrators are afforded" under the *Turner* standard. *Ibid.* Because the court held that petitioner did not prove that the CDC policy was unconstitutional, it did not reach "the ultimate question of whether the CDC administrators are entitled to qualified immunity." *Ibid.*

b. On July 28, 2003, the court of appeals denied petitioner's petition for rehearing, and a majority of the court voted to deny petitioner's suggestion for rehearing en banc. Judge Ferguson, joined by three other judges, dissented on the ground that the panel's opinion "impermissibly construes the Court's decision in *Turner* v. *Safley* * * * to overrule *Lee*." Pet. App. 38a. The dissenters explained that "[t]he panel's decision ignores the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny and fails to recognize that [the] *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological interest." *Ibid.* (internal quotation marks and citations omitted). They noted that "[l]ike the Eighth Amendment prohibition of cruel and unusual punishment, the Fourteenth Amendment's ban on invidious state discrimination specifically contemplates a limitation on state power that is 'complementary' to the goals of effective imprisonment." *Id.* at 48a-49a (citation omitted). They therefore distinguished

this case from all other cases to which *Turner* has been applied, noting that the rights asserted in those cases, unlike "the right to be free from state-sponsored segregation," are not "central to the legitimacy of our system of justice, including the penal system." *Id.* at 49a.

The dissenting judges also rejected the panel's suggestion "that strict scrutiny of race-based policies would unnecessarily limit prison officials' ability to effectively manage prisons or open the floodgates to frivolous litigation." Pet. App. 46a. They pointed out that this Court has explicitly recognized "unique circumstances under which a race-based classification may be permissible," *ibid.*, and stated that "it is possible, even likely, that prison officials could show that the current policy meets the test," *id.* at 47a.

SUMMARY OF ARGUMENT

1. The court of appeals erred in applying the deferential "reasonably related" standard articulated in *Turner* v. *Safley*, 482 U.S. 78 (1987), to determine whether the CDC's race-based housing policy violates the Equal Protection Clause of the Fourteenth Amendment. This Court has repeatedly held that *all* racial classifications imposed by government are subject to strict scrutiny review. This Court's decision in *Turner* did not change the longstanding principle that such racial classifications, which are suspect on their face, must be narrowly tailored to achieve a compelling government interest. In *Lee* v. *Washington*, 390 U.S. 333 (1968), this Court affirmed a district court's invalidation of a law requiring racial segregation in prisons on the ground that it was not narrowly tailored to the State's interest in maintaining prison security and discipline. The Ninth Circuit's decision in this case

erroneously construes *Turner* to overrule *Lee*. Nothing in the *Turner* opinion purports to overrule *Lee*. To the contrary, *Lee* remains viable and continues to be cited for the proposition that racial segregation in prisons is unconstitutional.

Moreover, *Turner* itself makes clear that its deferential standard applies only to rights that are inconsistent with prope incarceration. *Turner* thus applies to cases involving rights, such as associational, privacy, and First Amendment rights, that are inconsistent with the status of a prisoner or with legitimate penological objectives. But other rights, like the rights to be free from racial discrimination or cruel and unusual punishment, are not inconsistent with proper prison administration, and indeed bolster the legitimacy of our criminal justice system, including the penal system. For this reason, this Court has never applied *Turner* in the Eighth Amendment context, and a number of lower courts have refused to apply *Turner* to suspect-classification equal protection claims. Indeed, application of *Turner*'s highly deferential standard of review to evaluate the constitutionality of racial classifications would undermine the purpose of the Fourteenth Amendment, which is to limit States' discretion in matters of race. Applying *Turner* to suspect classifications would undermine a basic premise of this Court's equal protection jurisprudence by effectively subjecting all classifications, including those along expressly racial lines, to rational basis review.

Continuing to apply strict scrutiny to racial classifications in the prison context would not preclude prison administrators from using race in certain, limited circumstances, or courts from applying appropriate deference to such judgments. To the contrary, *Lee* explicitly recognizes that there may exist some particularized circumstances in which race may be used for the necessities of prison security and discipline. Indeed, this Court has repeatedly disclaimed the view that strict scrutiny is strict in theory, but fatal in fact. Strict scrutiny clearly permits courts to distinguish between efforts to restore order in the immediate wake of a prison disturbance with racial overtones, and the kind of permanent, institutionalized use of race to segregate inmates at issue here and in *Lee*.

2. The CDC's race-based housing policy cannot survive strict scrutiny. The State has identified a compelling interest in maintaining prison security and minimizing racial violence, but it has failed to demonstrate that its segregation policy is narrowly tailored to advance that interest. The record is devoid of specific, widespread instances of such violence in the reception-center cells. Yet, the plan applies to all inmates housed in reception centers at all CDC facilities, including transferred inmates who have established records of nonviolence. This fact contradicts the CDC's contention that race-based housing assignments are justified in the reception centers because officials need at least 60 days to determine whether inmates pose a danger to others. Moreover, at the same time respondents argue that segregation is necessary to minimize racial violence, they assert that racial integration is used to minimize that same violence in prison dormitories. Accordingly, the CDC's race-based housing policy is not narrowly tailored, but arbitrary. Indeed, the policy would even fail the relatively undemanding *Turner* standard, if that standard were applicable.

ARGUMENT

I. STRICT SCRUTINY, RATHER THAN *TURNER*'S "REASONABLY RELATED" STANDARD, APPLIES TO THE CDC'S RACE-BASED HOUSING POLICY

A. All Race-Based State Actions Must Satisfy Strict Scrutiny

The court of appeals erred in applying the deferential "reasonably related" standard articulated in *Turner* v. *Safley*, 482 U.S. 78 (1987), to determine whether the CDC's race-based housing policy violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no State shall "deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. "Because the Fourteenth Amendment 'protect[s] *persons*, not *groups*,' *all 'governmental action based on race*—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.'" *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2337 (2003) (emphasis added) (quoting *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995)).

Thus, it is well-settled that "*all racial classifications imposed by government* 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 123 S. Ct. at 2337, 2338 (emphasis added) (quoting *Adarand*, 515 U.S. at 227). This Court has repeatedly explained that:

> "[a]bsent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Grutter, 123 S. Ct. at 2338.

Indeed, without any indication that it was applying anything other than the traditionally searching review of racial classifications under the Fourteenth Amendment, this Court, in *Lee* v. *Washington*, 390 U.S. 333 (1968), "smoked out" one such illegitimate use of race by prison officials more than 35 years ago. In *Lee*, this Court rejected the State's contention that requiring desegregation of prisons would fail to "make * * * allowance for the necessities of prison security and discipline." 390 U.S. at 334. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion[]," namely "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.* The concurring Justices were quick to add, however, that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this

Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

As the *Lee* concurrence makes clear, the majority did not relax the standard of review for race-based equal protection claims in the prison context. To the contrary, *Lee* suggests only that "necessities of prison security and discipline" might provide a compelling government interest sufficient "in particularized circumstances" to justify the use of a narrowly tailored racial classification, not that the use of race to address such necessities is presumptively constitutional. See, *e.g.*, *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972) ("[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'") (quoting *Lee*, 390 U.S. at 334); *Grutter*, 123 S. Ct. at 2352 (Thomas, J., concurring in part and dissenting in part) (citing *Lee* for the proposition that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (citing *Lee* for the proposition that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'" (citations omitted)); cf. *Sockwell* v. *Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (relying on *Lee* to hold that prison authorities' "generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation").

B. *Turner*'s "Reasonably Related" Standard Does Not Apply To The Fourteenth Amendment's Prohibition Of Racial Discrimination

By applying *Turner*'s "reasonably related" standard to a suspect-classification equal protection claim, the Ninth Circuit effectively construed *Turner* to overrule *Lee* and this Court's repeated command that "all" governmental racial classifications be subject to strict scrutiny analysis. See Pet. App. 13a ("Thus, to the extent, if any, that *Turner*'s 'reasonably related' standard and *Lee*'s 'particularized circumstances' inquiry point to divergent paths, we are bound to follow *Turner*."). But *Turner* did no such thing. Rather, *Turner* considered the constitutionality of prison regulations related to correspondence between inmates and inmates' right to marry. 482 U.S. at 81-82. This Court began its analysis by reaffirming the longstanding principle that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and that prisoners retain a number of constitutional rights, including, under *Lee*, the right to be "protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 84. This Court also explained that "[p]rison administration is * * * a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* at 85. Accordingly, the *Turner* Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The Court explained that "such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional opera-

tions.'" *Ibid.* (citation omitted). However, this Court has never applied this standard, or otherwise exercised "judicial restraint," in evaluating claims of invidious racial discrimination under the Equal Protection Clause.

Indeed, this Court has suggested that *Turner*'s deferential standard applies only to rights that are "inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003). In *Shaw* v. *Murphy*, 532 U.S. 223 (2001), for example, the Court explained:

> [T]he constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or "with the legitimate penological objectives of the corrections system." We have thus sustained proscriptions of media interviews with individual inmates, prohibitions on the activities of a prisoners' labor union, and restrictions on inmate-to-inmate written correspondence. Moreover, because the "problems of prisons in America are complex and intractable," and because courts are particularly "ill equipped" to deal with these problems, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.

Id. at 229 (citations omitted); see *O'Lone* v. *Shabazz*, 482 U.S. 342, 348 (1987) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (citation omitted)). The cases to which this Court has applied the *Turner* standard are markedly different than this

one, in that they involved restrictions on the exercise of rights which, by their very nature, may be incompatible with legitimate penological interests. See, *e.g.*, *Overton*, 539 U.S. at 131 (freedom of association claims relating to family visitation); *Shaw* v. *Murphy*, 532 U.S. 223, 228 (2001) (First Amendment challenge to prison regulation restricting inmate correspondence); *Washington* v. *Harper*, 494 U.S. 210, 221-223 (1990) (due process challenge to involuntary medication of mentally ill prisoner); *Thornburgh* v. *Abbott*, 490 U.S. 401, 407 (1989) (First Amendment challenge to prison regulations governing receipt of subscription publications); *O'Lone*, 482 U.S. at 349-350 (Free Exercise Clause challenge to prison work rules that had the effect of limiting prisoners' attendance at particular religious services).

In contrast, the right to be free from invidious racial discrimination under the Equal Protection Clause of the Fourteenth Amendment is not only fully consistent with proper prison administration, but it bolsters the legitimacy of the criminal justice system, including the penal system. See, *e.g.*, *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Batson* v. *Kentucky*, 476 U.S. 79, 99 (1986) ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."). In this respect, petitioner's asserted right is akin to the right to be free from cruel and unusual punishment under the Eighth Amendment, violations of which, even after *Turner*, are judged according to the Eighth Amendment "deliberate indifference" standard, rather than a "reasonably related" standard. See, *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002). Accordingly,

the Ninth Circuit itself previously refused to apply *Turner* to a prisoner's Eighth Amendment claim, explaining that "*Turner* has been applied only where the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment." *Jordan* v. *Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993). Similarly, other circuit courts have refused to apply *Turner* to suspect-classification equal protection claims. See *Pitts* v. *Thornburgh*, 866 F.2d 1450, 1454 (D.C. Cir. 1989) (refusing to apply *Turner* to a gender-based equal protection claim); *Sockwell*, 20 F.3d at 191 (post-*Turner* decision applying *Lee* to hold unconstitutional racial segregation of prisoners in two-person cells, despite prison authorities' asserted interest in prison security); *Black* v. *Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (post-*Turner* decision holding that "absent a compelling state interest, racial discrimination in administering prisons violates the Equal Protection Clause of the Fourteenth Amendment"); see also *Pargo* v. *Elliott*, 49 F.3d 1355, 1357 (8th Cir. 1995) (noting that "*Turner* does not foreclose all heightened judicial review"). But cf. *Morrison* v. *Garraghty*, 239 F.3d 648, 652, 655 (4th Cir. 2001) (applying *Turner* to equal protection challenge to prison policy that "requests for acquiring or maintaining existing articles of Native American faith will only be considered for those inmates who are bona fide Native Americans") (emphasis omitted).

In *Pitts*, for example, the D.C. Circuit held that *Turner*'s "reasonably related" standard was inappropriate for a case arising under the Equal Protection Clause because such a case "touches upon important concerns that the Supreme Court has clearly held call for stepped-up scrutiny." 866 F.2d at 1454. The court

further explained that suspect-classification equal protection claims "differ in kind from challenges to limitations upon personal rights" that are subject to *Turner*'s "reasonably related" standard. *Id.* at 1455. As the court explained:

> While an equal protection claim, too, is in one sense a personal right—*i.e.*, the right not to be discriminated against—the claim is also a demand that governmental action that affects an individual not be predicated upon constitutionally defective reasoning. The claim charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties. This difference is illustrated by the many cases finding that even [when] the government favors a traditionally protected class * * *, its acts are still subject to heightened scrutiny.

Ibid.

Indeed, application of *Turner* to state imposed classifications based on race in prisons would require courts to presume the constitutionality of inherently suspect uses of race based on the "common-sense" of state officials. Pet. App. 19a-22a. But the "sensibility" of States in matters of race was the primary concern behind the Fourteenth Amendment's Equal Protection Clause, see, *e.g.*, *Rose*, 443 U.S. at 554-555. Moreover, application of *Turner* to race-based prison policies would allow the government to use race when there are race-neutral means to accomplish the same goal and when the policy does not even advance that goal, but prison administrators might reasonably believe that it does. Cf. Pet. App. 22a. A policy of judicial deference that presumes that a State's use of race is appropriate unless the inmate overcomes a "high burden" of proving

to the contrary would therefore undermine the very purpose of the Fourteenth Amendment. See, *e.g.*, *Pitts*, 866 F.2d at 1455 ("The court may not slight the task more directly committed to it in a live case or controversy and which is peculiarly within its competence and historic mission: rooting out invidious discrimination condemned by the Constitution.").

Allowing *Turner*'s deferential standard of review to trump strict scrutiny of racial classifications would undermine a fundamental premise of this Court's Equal Protection Clause jurisprudence. Under the analysis adopted by the court below, all government classifications in the prison context would effectively be subject to rational basis review without regard to whether the classification is drawn along racial lines. But this Court's decisions make clear that racial classifications are uniquely invidious and particularly likely to lead to abuse. For that reason, in many contexts where government action generally is reviewed deferentially or not at all, government action based on race is subject to strict scrutiny. For example, despite the deference generally given to prosecutors in employing peremptory challenges, see *Batson*, 476 U.S. at 89 (noting that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried" (citation omitted)), the use of peremptory challenges to strike jurors on the basis of race is forbidden, *id.* at 89-96. Similarly, despite this Court's recognition of the difficulties of imposing judicially manageable standards for reviewing redistricting decisions, see generally *Vieth* v. *Jubelirer*, 124 S. Ct. 1769 (2004), racial gerrymandering is forbidden, see *Shaw* v. *Reno*, 509 U.S. 630, 650 (1993) ("[N]othing in our case law compels

the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." (citation omitted)). And as the dissenting judges below noted, notwithstanding the high degree of deference generally owed to the political branches in the conduct of military affairs, see, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981), even "military officials acting during wartime are subject to strict scrutiny" when they take expressly race-based actions. Pet. App. 42a. It necessarily follows that "prison officials engaging in the routine performance of their duties should be subject to [strict scrutiny] as well." *Ibid.*

C. Application Of Strict Scrutiny Would Preserve Any Legitimate Need For Flexibility By Prison Officials

Application of strict scrutiny to racial classifications in the prison context would not foreclose the use of such classifications in certain "particularized circumstances." *Lee*, 390 U.S. at 334. Indeed, *Lee* explicitly recognized that "necessities of prison security and discipline" could provide a compelling justification for a narrowly tailored use of race. *Ibid.*; accord *Grutter*, 123 S. Ct. at 2352 (Thomas, J., concurring in part and dissenting in part); *Croson*, 488 U.S. at 521 (Scalia, J., concurring). This Court has repeatedly stated that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Grutter*, 123 S. Ct. at 2338 (citation omitted). Rather, as the Court explained in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the

Equal Protection Clause." *Ibid.* "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context." *Ibid.*

Applying heightened scrutiny to a gender-based equal protection claim in the prison context, for example, the D.C. Circuit explained that the "inquiry must still acknowledge the importance of the state's interest in the prison context. * * * This acknowledgment of the difficulties inherent in the prison context does not reduce or eviscerate heightened scrutiny, but it does recognize that those difficulties do not disappear once a party raises a discrimination claim." *Pitts*, 866 F.2d at 1455.

Moreover, even under strict scrutiny, the expertise of prison officials must be taken into account, and some flexibility must be accorded prison officials who, "acting in good faith and in particularized circumstances," adopt race-based policies for the purpose of "maintaining security, discipline, and good order in [their] prisons and jails." *Lee*, 390 U.S. at 334 (concurring opinion). Such deference, properly constrained, is not inconsistent with the application of strict scrutiny in this type of highly specialized context. Cf. *Grutter*, 123 S. Ct. at 2339 (affording "a degree of deference" to judgments by law school officials about importance and benefits of diversity in achieving their educational goals); *id.* at 2349 (Scalia, J., concurring in part and dissenting in part) (noting that affording university officials "a degree of deference" in using race to achieve their goal of diversity "does not imply abandonment or abdication of judicial review") (citing *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003)). In sum, strict scrutiny allows courts to distinguish between the use of race "in particularized circumstances," such as the restoration of order in the immediate aftermath of a prison disturbance with racial overtones and the kind of systematic, institutionalized racial discrimination condemned in *Lee* and at issue here.

II. THE CDC'S RACE-BASED HOUSING POLICY VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST

To withstand strict scrutiny, the State must establish that it has a compelling interest in using race to determine housing placements at CDC reception centers and that its race-based housing policy is narrowly tailored to achieve that goal. *Adarand*, 515 U.S. at 227. The record is more than adequate for this Court to conclude that, even though the State has a compelling interest in the security and safety of its prisons, its race-based housing policy is not narrowly tailored to achieve that goal. Indeed, both the court of appeals and the district court concluded that the CDC policy passes muster only under the highly deferential "reasonably related" standard articulated in *Turner*, and that it would likely fail under any heightened standard of review. See Pet. App. 31a, 33a-35a.

A. The CDC Has A Compelling Interest In The Security, Discipline, And Good Order Of Its Prisons

As suggested by this Court's decision in *Lee*, the State has a compelling interest in "the security, discipline, and good order" of its prisons. 390 U.S. at 334 (concurring opinion). Indeed, this Court has repeatedly acknowledged the vital need of prison officials to maintain the security and safety of their institutions.

See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977) (Burger, C.J., concurring) (noting that "[p]risons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society"); see also *Pell*, 417 U.S. at 826-827 ("The 'normal activity' to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security.").

B. The CDC's Segregation Policy Is Not Narrowly Tailored To Achieve Its Compelling Interest In Prison Security

As *Lee*'s concurring opinion makes clear, a State's compelling interest in the security, discipline, and good order of its prisons does not relieve state prison officials of their constitutional obligation to ensure that any consideration of race as a means of achieving those goals is narrowly tailored. 390 U.S. at 334. "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 123 S. Ct. at 2341 (internal quotation marks and citations omitted). Thus, narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the [compelling government interest]." *Id.* at

2345. Race-based policies, therefore, that use race in lieu of any individualized consideration generally do not satisfy strict scrutiny. See, *e.g.*, *id.* at 2343 (distinguishing constitutional race-conscious law school admissions program that "engages in a highly individualized, holistic review of each applicant's file" from undergraduate admissions program that awards automatic "bonuses" to applicants on the basis of race).

Even taking the expertise of prison officials into account and affording them an appropriate level of flexibility in determining the best way to address their concerns for prison security, the record, as summarized by the court of appeals, fails to establish that the CDC's race-based housing policy is narrowly tailored to achieve a compelling government interest. The CDC policy, which does not even seem to exist in written form, applies to *all* CDC institutions and to *all* inmates, including transfers from other CDC facilities, no matter how long inmates have been institutionalized without incident and regardless of their propensity to engage in racial violence. The fact that the policy applies to transfers as well as new arrivals substantially detracts from the prison administrators' argument that segregation is justified in the reception centers because "they need 60 days to analyze each inmate on an individual basis to determine whether the inmate poses a danger to others." Pet. App. 4a. Petitioner, for example, has been an inmate in the CDC for almost twenty years and, during that period, has been transferred a number of times. By now the CDC has undoubtedly gauged his propensity to engage in racial violence, yet it continues to subject him, and all other inmates, to the race-based housing policy every time he is transferred to a new institution.

At a minimum, there is no reason to believe that the CDC could not address its security concerns through a system that was "flexible enough to ensure that each [inmate] is evaluated as an individual and not in a way that makes [his] race or ethnicity the defining feature of his [placement]." *Grutter*, 123 S. Ct. at 2343. This Court has repeatedly characterized the importance of such individualized consideration in the context of race-based state action as "paramount," see, *e.g.*, *id.* at 2343, and it has never upheld a State's use of a racial classification without at least ensuring that the State has afforded each person subject to the racial classification individualized consideration.

Moreover, the CDC's view that segregation is necessary to minimize "racially based conflict in the cells and in the yard," Pet. App. 4a, is inconsistent with its position that maintaining racial integration within the dormitories it uses to house prisoners after the initial segregated period "reduce[s] the likelihood of racial violence," *id.* at 5a. In petitioner's case, for example, he has been repeatedly transferred from an institution's general population where racial integration is the preferred means of promoting security to a new institution's reception center where racial segregation is applied to the same end.

The CDC's racial segregation policy is also inconsistent with the expert determinations of the Federal Bureau of Prisons (BOP) and virtually all other States, which address concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence. Federal regulations and BOP policy expressly forbid racial segregation in the federal prison system. The governing regulation, 28 C.F.R.

551.90, entitled "Non-Discrimination Toward Inmates," provides:

> Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.

Ibid. In furtherance of that regulation, BOP Program Statement 1040.04 (Jan. 29, 1999), directs each Warden to "review and, as necessary, establish local procedures to ensure that inmates are provided essential equality of opportunity in being considered for various program options, work assignments, and decisions concerning classification status." While rejecting the kind of segregation reflected in the policy at issue here, BOP does consider race as one of many demographic factors, such as age, nationality, religion, and gang affiliation, to promote integrated and diverse institutions and housing units. Thus, although generally not a factor in making housing determinations, BOP monitors the racial composition of its institutions and may consider race in overseeing the population of an institution as necessary to ensure that the institution does not become de facto segregated.

Thus, while BOP recognizes the serious problem of racial violence in the prison context, it does not accept generalized assumptions that persons of different races cannot safely be housed together. Rather, federal prisons are committed to a policy of non-discrimination in housing, as well as in all other prison programs. In BOP's judgment and experience, this policy leads to less violence in BOP's institutions and better prepares inmates for re-entry into society. For these same

reasons, BOP does not allow inmates to choose their cellmates.

Moreover, in addressing more particularized concerns about racial violence, BOP focuses on inmate behavior, not race. If an inmate is disruptive to particular inmates, he is removed and placed in a higher security environment to remove the threat to others. Any such judgment, however, is based on an individualized assessment of a prisoner's behavior and background, not on assumptions based on race.

Like BOP, most States follow a non-discrimination policy in making inmate housing determinations.[2] Moreover, BOP is not aware of any State that follows

[2] See generally Martha L. Henderson et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 Prison J. 295, 301-307 (2000); see also, *e.g.*, Ariz. Corr. Reg. § 908.02(1.5) (Sept. 1, 1996) (prison administrators shall "[b]ase inmate housing assignments on sound correctional classification practices and not discriminate against any individual or group of inmates when assigning inmate housing"; "[i]nmates shall be assigned to a cell on a random basis"); Colo. Corr. Reg. § 850-15 (Oct. 15, 2003) ("ensur[ing] that offender program access, work assignments, and administrative decisions are made without regard to offenders' race"); Conn. Corr. Reg. § 9.2(1) (Mar. 5, 2003) ("The [inmate] classification system shall not foster discrimination in status, including housing, programming, job assignment, or on the basis of race, creed, color, or national origin."); Tenn. Corr. Reg. § 506.14(VI)(A)(4) (Aug. 15, 2003) (housing assignments "shall not be made on the basis of race, color, national origin, religion, or political views unless it is justified by legitimate and documented security concerns (i.e., opposing or rival security threat group affiliation)"); accord American Corr. Ass'n, *Standards for Adult Correctional Institutions* 76 (4th ed. 2003) (Standard 4-4277: requiring "[w]ritten policy, procedure, and practice prohibit[ing] discrimination based on an inmate's race * * * in making administrative decisions and in providing access to programs").

California's practice of racially segregating all new inmates in a facility, even those that have been transferred from another institution and that have no gang affiliation or history of race-related violence. That BOP and other States address identical concerns of prison security through race-neutral or more narrowly tailored practices demonstrates that the CDC's segregation policy is substantially overbroad and unnecessary to achieve the compelling interest of prison security. It also places this case in stark contrast to the *Grutter* case, in which the majority of States viewed the consideration of race as necessary to acheive a compelling interest. See *Grutter*, 123 S. Ct. at 2339-2341 (affording deference to law schools' assessments of the educational benefits of racial diversity where those assessments were supported by social science studies and numerous amici in the fields of education, business, and the military).[3]

The Fifth Circuit's decision in *Sockwell* v. *Phelps*, *supra*, is instructive. There, the court struck down a

[3] Indeed, the CDC's policy is particularly inappropriate in light of recent evidence that integration of two-person cells does not lead to increased violence and that it actually may decrease violence. See, *e.g.*, Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 L. & Soc'y Rev. 743, 774 (2002) (After integration of two-person cells in Texas, "the rate of assaults among desegregated inmates was less than or at least equal to the rate of assaults among inmates who were not desegregated. Integration did not result in disproportionate violence; rather, over the long term, the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated."); see also, *e.g.*, Henderson et al., *supra*, at 304, 307 (noting that the majority of prison wardens surveyed stated that integrating cells would decrease or have no effect on the level of violence in an institution).

Louisiana prison policy that, like the CDC's policy in this case, required segregation of all prisoners housed in two-person cells, although the rest of the prison was fully integrated. 20 F.3d at 190. A deputy warden testified that the policy was motivated by security concerns and past incidents of violence between black and white prisoners. *Id.* at 191. The court, relying on *Lee*, held that the prison administrators' asserted generalized security interest did not justify a systematic, institutionalized policy of racial segregation in two-person cells. Rather, the court explained that "[i]f violent disruptions did occur, we would expect the prison officials to take appropriate action against the offending prisoners, black or white." *Ibid.* The court further held that although "racial segregation of offending individual prisoners would be acceptable if, based on an individualized analysis, the prison officials determined such action would be needed to stifle particular instances of racial violence," the administrators' broad contention "that integrated two-man cells may lead to more violence between black and white prisoners is not tenable." *Ibid.*[4]

[4] Similarly, on the few occasions in which courts have confronted prison polices, like the CDC's, of temporary racial segregation for newly received inmates, they have not hesitated to strike down the policies. See *Blevins* v. *Brew*, 593 F. Supp. 245, 248-249 (W.D. Wis. 1984) (assigning new inmates to double cells in temporary reception centers based on race in a federal correctional facility "violated clearly established constitutional rights" because "racial segregation is an appropriate response [to racial conflict] only if no other means are available for maintaining prison security or discipline"); *Stewart* v. *Rhodes*, 473 F. Supp. 1185, 1187-1190 (S.D. Ohio 1979) (assigning inmates to double cells based on race in a receiving and processing center was unconstitutional because there was no evidence that integration would lead to increased violence), appeal dismissed, 661 F.2d 934 (6th Cir. 1981).

Likewise here, the CDC's housing policy is not based on individualized analysis but rather, on general fears of racial violence. As in *Sockwell*, there is no evidence of widespread instances of serious racial violence in CDC reception-center cells across the State. The only evidence offered by the State in support of the policy—testimony conveying prison officials' general fears of racial violence, as well as some anecdotal testimony and newspaper articles relating to race riots that occurred at a single CDC institution, Pelican Bay, several years ago—is simply insufficient to justify a statewide, general policy of segregation. See Pet. App. 4a, 16a-17a n.9. See also *United States* v. *Wyandotte County*, 480 F.2d 969, 971 (10th Cir.) (holding that a vague fear of racial violence on the part of prison authorities is insufficient to justify a broad policy of segregation), cert. denied, 414 U.S. 1068 (1973).

In short, the policy is not narrowly tailored, but arbitrary.[5] As the three-judge district court in *Lee* explained:

> We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster * * * the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such * * * practices must be declared unconstitutional in light of the clear principles controlling.

[5] Indeed, the CDC's race-based housing policy, which would subject even inmates with an established record of nonviolence to racial segregation every time they are transferred to a new institution, would not satisfy a proper application of *Turner*'s "reasonably related" standard, much less strict scrutiny.

Washington v. *Lee*, 263 F. Supp. 327, 331-332 (D. Ala. 1966). The CDC's race-based housing policy for its reception-center cells is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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GARRISON S. JOHNSON,

Petitioner,

vs.

CALIFORNIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ITS THREE CALIFORNIA AFFILIATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. Of particular note here, the ACLU represented the prisoner appellees in *Lee v. Washington*, 390 U.S. 333 (1968), where this Court held that Alabama statutes requiring racial segregation in prisons and jails violated the Fourteenth Amendment. The ACLU is joined on this brief by its three California affiliates: the ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties.

STATEMENT OF THE CASE

California has a policy of segregating prisoners by race for the first sixty days of their incarceration and for the first sixty days after their transfer to a new institution. This case presents the question of whether California's policy violates the Constitution. In 1995, Garrison Johnson, acting without a lawyer, sued the California Department of Corrections, alleging that the State's long-standing practice of segregating prisoners by race for sixty days each time they arrive at a new institution violated his right to equal protection of the laws under the Fourteenth Amendment. Pet. App. 3a-6a. In 1998, the United States District Court for the Central District of California dismissed his complaint, but the Ninth Circuit

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

reversed in part, holding that Johnson had stated a claim of racial discrimination under the Equal Protection Clause. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) (*per curiam*).

On remand the district court appointed counsel, and discovery was conducted. Pet. App. 6a. After initially denying defendants' motion to dismiss, the district court reconsidered defendants' motion to dismiss on the grounds of qualified immunity in light of *Saucier v. Katz*, 533 U.S. 194 (2001). Pet. App. 33a. Upon reconsideration, the court restated its holding that there was a triable issue of fact as to whether the State's policy violated the Equal Protection Clause. *Id.* However, citing *Turner v. Safley*, 482 U.S. 78 (1987), the district court noted that the State's policy might not violate the Equal Protection Clause, and it therefore granted qualified immunity to the two defendants who had been sued for damages, finding that the applicable law had not been clearly established. Pet. App. 34a.

On appeal, the Ninth Circuit reached the merits of petitioner's equal protection claim. Pet. App. 7a. However, it rejected petitioner's argument that the State's explicit policy of racial discrimination should be subject to strict judicial scrutiny. Instead, it held that the four-part *Turner* test was controlling and that the relevant issue to be decided was whether the State's uncontested policy of racial segregation "is reasonably related to [its] concern for increased racial violence." Pet. App. 13a. In resolving that question, the court first assumed a "common-sense connection" between the State's legitimate interest in prison safety and its policy of racially segregating prisoners, which in the court's view Johnson was unable to disprove. Pet. App. 22a As a result, the State "was not required to make any evidentiary showing concerning the connection." *Id.* (internal quotation and citation omitted). Next, the court broadly framed the question of whether Johnson had alternative means to exercise his right to be free from governmental racial discrimination by looking

at his entire period of incarceration rather than the multiple sixty-day periods during which the State segregated him, and it found that reasonable alternatives existed. Pet. App. 23a-24a. The court then held that Johnson did not rebut the State's claim that violence would result if the State stopped segregating the reception centers by race. Pet. App. 27a. Finally, the court found that Johnson had failed to meet his burden of showing that there are "obvious, easy alternatives" to racial segregation, which would demonstrate that the State's response was exaggerated. Pet. App. 29a. Thus, while noting that the court would "undoubtedly . . . strike [the policy] down as unconstitutional" if it were implemented anywhere other than a prison, the court held that the policy was constitutional. Pet. App. 31a.

The Ninth Circuit denied Johnson's petition for rehearing and rehearing *en banc*, Pet. App. 37a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

The Ninth Circuit erred when it applied the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987), rather than strict scrutiny, to California's policy of segregating prisoners by race for sixty days every time they arrive at a new institution.

All government classifications based on race are subject to strict scrutiny under this Court's holdings. That is true for the criminal justice system in general, and it is true more specifically for prisons and jails. Nothing in this case justifies an exception to that general rule. A State's allegedly good intentions in classifying its citizens by race do not remove the need for strict judicial scrutiny.

If anything, the need for strict scrutiny is underscored by the context in which this case arises. Minorities are vastly over-represented in prisons and jails. Minority defendants also receive longer sentences and higher bail amounts than

white defendants. These well-known statistics have led to a widespread perception of racial discrimination in the criminal justice system. In the face of that perception, the assurance that any express racial classification will be subject to strict scrutiny is critical to restoring public confidence in the evenhanded administration of justice.

Moreover, the rationale for applying the deferential *Turner* standard does not extend to claims of racial discrimination. *Turner* rests on the understanding that prisoners necessarily lose control over many aspects of their daily lives once incarcerated, and that the exercise of certain rights by prisoners will often conflict with the necessities of confinement. The right of free association, for example, is inevitably restricted in prison. Accordingly, the Court has applied the *Turner* standard when reviewing regulations restricting such rights, and has upheld those regulations if they are reasonably related to a legitimate penological interest.

On the other hand, the Court has not applied *Turner* when the rights at issue do not depend on volitional choices by the prisoner but, rather, exist independent of those choices as constitutionally-imposed limits on government power. For example, the Court has not applied *Turner* when reviewing claims of cruel and unusual punishment under the Eighth Amendment, or the right to be free from arbitrary punishment safeguarded by the Due Process Clause. These are not rights that are "exercised," to use the language of *Turner*. They are rights that are enjoyed by all prisoners, that cannot be waived by any prisoner, and that are not diminished by the fact of incarceration. Racial segregation plainly fits into this latter category, as the Court made clear in *Lee v. Washington*, 390 U.S. 333 (1968).

In *Lee*, this Court was properly skeptical of allowing racial segregation on the mere assertion of possible racial violence. At the same time, it made clear that courts remain

free to consider the exigencies of prison security and discipline in particularized circumstances when reviewing policies that segregate by race. Accordingly, application of the *Turner* standard to racial segregation claims is unnecessary.

Such application would also be inconsistent with the core values of a system dedicated to equal justice under the law; prison policies imposing racial segregation should not carry the presumption of constitutionality required by the *Turner* standard. Moreover, under *Turner*, evidence that segregation actually promotes racial violence and creates an atmosphere of racial fear and mistrust can simply be ignored. By using race as a proxy for gang membership and for a proclivity for violence, the State's policy in this case is both overinclusive and underinclusive; it also perpetuates stigmatizing racial stereotypes.

When reviewed under strict scrutiny, the State's policy fails because it is not narrowly tailored: it is indefinite in duration; it is undifferentiated in its sweeping generalizations regarding race and the propensity for violence; and there is no evidence that the State considered any race-neutral means of achieving its goals. Therefore, the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. A state policy that regularly segregates prisoners according to race is subject to strict judicial scrutiny

"Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (citation and internal quotations omitted); *see also Miller v. Johnson*, 515 U.S. 900, 904 (1995) (noting that the "central mandate [of the Equal Protection Clause] is racial neutrality in governmental

decisionmaking"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954) (holding that segregation of school children solely on the basis of race violates the Equal Protection Clause "even though the physical facilities and other 'tangible' factors may be equal"); *cf. Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . .").

Thus, this Court has held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.") (internal quotation omitted); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("It is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.") (internal quotation omitted); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., plurality opinion) (applying strict scrutiny to racial classifications); *id.* at 520 (Scalia, J., concurring in judgment) ("I agree . . . with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race . . . ."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (stating that "racial classifications of any sort must be subjected to 'strict scrutiny'"); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Such classifications are subject to the most exacting scrutiny[.]"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that at "the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'") (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

Even when this nation was at war, this Court has applied the "most rigid scrutiny" to racial classifications related to national security. *Korematsu*, 323 U.S. at 216. The Court in that case recognized that the Government believed "a menace to the national defense and safety [existed], which demanded that prompt and adequate measures be taken," but nonetheless applied strict scrutiny in its review of an order excluding all persons of Japanese origin. *Id.* at 218-19 (internal quotation omitted). Similarly, this Court has refused in the face of violence to alter its finding that segregated schools do not survive strict scrutiny, requiring a state to integrate a public high school despite accepting the lower court's findings that the integration had led to repeated violence, had an adverse effect on the education of the students, and had generally led to "chaos, bedlam and turmoil." *Cooper v. Aaron*, 358 U.S. 1, 13, 16 (1958) (quotation omitted) ("The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.").

Nor has this Court hesitated to apply strict scrutiny to racial classifications in sensitive areas of the criminal justice system. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 100 (1986). The Court in *Batson* noted "the prosecutor's historical privilege of peremptory challenge free of judicial control" and the "'long and widely held belief that peremptory challenge is a necessary part of trial by jury'" as a "means of assuring the selection of a qualified and unbiased jury." *Id.* at 91 & n.15 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)). Nonetheless, the Court flatly held that challenging a juror on account of his or her race violates the Equal Protection Clause. *Id.* at 89.

Furthermore, "the fact of equal application [to members of all races] does not immunize the statute from the

very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving*, 388 U.S. at 9.

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

Powers v. Ohio, 499 U.S. 400, 410 (1991).

Not even a State's allegedly "good intentions" in considering race remove the need for strict judicial scrutiny. *See Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270; *Adarand*, 515 U.S. at 224; *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment) ("That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race."); *Croson*, 488 U.S. at 493.

Lastly, in *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*), this Court applied heightened scrutiny to Alabama statutes that required racial segregation in prisons and jails, the very issue in this case. *Id.* at 333-34. The lower court rejected the prison's claims "that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts," and held that "it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966) (footnote omitted), *aff'd*, 390 U.S. 333 (1968). This Court affirmed in a *per curiam* opinion. *Lee*, 390 U.S. at 333-34; *see*

also Hudson v. Palmer, 468 U.S. 517, 523 (1984) (quoting *Lee* and stating "that invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to 'prison security and discipline'").

In his concurrence in *Lee*, Justice Black noted that "prison authorities have the right, acting in good faith and *in particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee*, 390 U.S. at 334 (Black, J., concurring) (emphasis added). However, the right to take racial tensions "into account" in order to ensure prisoners' safety does not relieve the States from strict judicial scrutiny of classifications on the basis of race. *See Lee*, 390 U.S. at 333; *cf. Gratz*, 539 U.S. at 270 (reviewing admissions policy that considered race in order to ensure educational diversity and stating, "[b]ecause racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, our review of whether such requirements have been met must entail a most searching examination") (internal quotations and citations omitted; alteration incorporated); *Adarand*, 515 U.S. at 228 ("[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race.").

The State's policy here does not survive review under strict scrutiny. Although protecting the safety of prisoners is a compelling state interest, the State's policy is not narrowly tailored to that interest: it is indefinite in duration and undifferentiated in its sweeping generalizations regarding race and the propensity for violence. Every time a male prisoner arrives at a California Department of Corrections facility, either as a new prisoner or as a transfer, he is initially housed for sixty days in a reception center, and while there, his chance of being celled with a prisoner of a different race "is '[p]retty close' to zero percent" because race is the dominant factor in housing at the reception centers. Pet. App. 2a-4a. This policy has been in place for over twenty years,

Pet. App. 21a, and has "no logical stopping point," *Wygant*, 476 U.S. at 275. In fact, there is no movement at all toward a non-racial initial classification system; instead, the current system will simply exist in perpetuity.

Further, there is no evidence that the State in this case considered race-neutral means of protecting the prisoners, *see Adarand*, 515 U.S. at 237-38, or that its practice is the least restrictive means to reach its goal. So far as the record reveals, no other prison system in the country, state or federal, has adopted a similar policy.

Finally, the State's broad use of race in its policy is not the best fit for its goal of reducing violence. The policy uses race as a mere proxy for gang membership, which is in turn a proxy for the potential for violence. The court below described seven specific incidents, all of which involved gang violence and many of which involved *intra*racial violence as opposed to interracial violence. Pet. App. 16a-17a n.9. The use of race as a proxy for gang membership also ignores the potential for violence and pressure against non-gang members by gang members of the same ethnicity.

Because the court below failed to apply strict scrutiny to the State's policy of racially segregating prisoners for sixty days every time the prisoners arrive at a new facility, *see* Pet. App. 11a-12a, its decision cannot be upheld.[2]

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[2] The application of the most exacting scrutiny to state-imposed racial segregation is also consistent with this nation's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination which provides, "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." International Convention on the Elimination of All Forms of Racial Discrimination, *adopted and opened for signature by the United Nations General Assembly* Dec. 21, 1965, art. 3, 660 U.N.T.S. 195, U.N. Doc. A/6014. The United States ratified the Convention in 1994. *See Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

II. Strict scrutiny of racial classifications is essential to public perceptions of fairness in the criminal justice system

"The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . . ." *Adarand*, 515 U.S. at 237. And despite this Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (internal quotations omitted), there is no area of our national life in which the perception of continuing racial discrimination is more widespread.

For example, in a 1997 Gallup poll, 72% of black respondents stated a belief that blacks are treated more harshly than whites in the criminal justice system; only 22% of black respondents believed that blacks and whites are treated "about the same." A Gallup Poll Social Audit, *Black/White Relations in the United States 1997: Topline and Trends* 27 (1997) (Item 24). Even among white respondents, nearly half (44%) believed that blacks are treated more harshly. *Id.* In the same poll, 60% of black respondents believed that blacks are treated less fairly than whites in dealings with the police. *Id.* at 25 (Item 22(f)). Indeed, the perception that race matters in the criminal justice system is all but universal. *See Georgia v. McCollum*, 505 U.S. 42, 61 n.1 (1992) (Thomas, J., concurring in the judgment) (noting that the phrase "all white jury" had appeared over 200 times in the preceding five years in the New York Times, Chicago Tribune, and Los Angeles Times).

The effects of a widespread loss of confidence in the racial fairness of the criminal justice system are obvious, concrete and substantial. "[L]awyers and judges increasingly perceive that some African-American jurors vote to acquit

black defendants for racial reasons, a decision sometimes expressed as the juror's desire not to send yet another black man to jail." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 679 (1995) (footnotes omitted). Indeed, the article's author – a former federal prosecutor – ultimately concludes that "it is the moral responsibility of black jurors to emancipate some guilty black outlaws." *Id.*

Unfortunately, there is ample raw material for a perception that the criminal justice system is not fair to minorities. Although African-Americans constitute 11.4 % of the American population aged 18 and over,[3] nearly half (46%) of state and federal prisoners are black. Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2000* 3 (rev. 2003). Black and Hispanic prisoners together make up nearly two-thirds (62%) of the federal and state prison population. *Id.* The Bureau of Justice Statistics estimates that on December 31, 2002, 10.4% of *all* black males aged 25 to 29 were in prison. Bureau of Justice Statistics, *Prisoners in 2002* 9 (rev. 2003).

This overrepresentation results in part from the fact that minorities receive longer sentences than whites. An American Bar Association report concluded that "[f]or all types of offenses, minorities generally serve more time until first release than do whites." American Bar Association, *The State of Criminal Justice* 17 (2000). For federal prisoners, the adoption of the federal sentencing guidelines appears to have aggravated the disparity. "Whereas the average imprisonment sentence given to blacks in non-guideline cases disposed in 1986-88 differed from sentences given to whites

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[3] U.S. Census Bureau, *Population by Race and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for the United States: 2000* (2001), *available at* http://www.census.gov/population/cen2000/phc-t1/tab01.pdf.

by only two to four months . . . , the gap had grown to 18 months in guideline cases in 1989, and to 25 months during the first half of 1990." Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90* 177 (1993). By 1990, black federal defendants were receiving sentences an average of 47% longer than white federal defendants. *Id.* The United States Sentencing Commission has frankly acknowledged "the growing disparity between sentences for Black and White federal defendants." United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 154 (1995), *available at* http://www.ussc.gov/crack/chap5-8.pdf.

Moreover, bail amounts for black defendants have been found to be substantially higher than those for whites, even when other variables are controlled. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stan. L. Rev. 987, 991-92 (1994) (after controlling for eleven variables relating to the severity of the alleged offense, bail amounts for black male defendants in New Haven were 35% higher than those set for white males).

It is against this background – substantial overrepresentation of minorities in prison, and a widespread perception that the criminal justice system is racially biased – that an explicit policy of segregating prisoners by race must be viewed.

Half a century ago, this Court recognized that "separate but equal" is an oxymoron; "[s]eparate educational facilities are inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. at 495. This is in large part because "the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group." *Id.* at 494. The Court recognized the inescapable stigma of racial segregation despite unchallenged findings below "that the Negro and white schools involved have been equalized, or are being

equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Id.* at 492; *see also Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. . . . The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."), *overruled by Brown v. Bd. of Educ.*, 347 U.S. at 494-95.

This Court has acknowledged that public confidence in the justice system is advanced when citizens are not subject to differential treatment based on their race. *See Batson*, 476 U.S. at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."). Conversely, there can be no doubt that segregation of prisoners by race, even if all prisoners are provided comparable conditions of confinement, will be widely interpreted as a badge of inferiority stamped upon minority prisoners. It will be seen by many as an explicit acknowledgment of what has long been suspected: that racial minorities are second-class citizens in the criminal justice system.

In light of these considerations, segregation of prisoners by race must be permitted, if at all, only upon a showing that it is the least intrusive means necessary to advance a compelling governmental interest. "'[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate[;] . . . racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Adarand*,

515 U.S. at 236 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35, 537 (1980) (Stevens, J., dissenting) (footnotes omitted)).

III. The Court should not apply *Turner* to racial segregation claims

A. The rationale for applying *Turner* does not apply to racial segregation claims

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court reviewed challenges to prison regulations restricting prisoner-to-prisoner correspondence and prisoners' ability to marry. The Court determined that these regulations could be upheld only if they were reasonably related to a legitimate penological interest. *Id.* at 89. The Court identified four factors relevant to the determination of the reasonableness of the regulations at issue: whether there is a "valid, rational connection" between the prison regulation and a legitimate and neutral governmental interest put forth to sustain it; whether there are alternative means of exercising the right that remain open to prisoners; what effect accommodation of the asserted constitutional right will have on guards and other prisoners; and whether ready alternatives are available, so that the challenged policy represents an "exaggerated response." *Id.* at 89-91 (citations and internal quotations omitted).

The Ninth Circuit, in its decision affirming the grant of summary judgment in favor of the prison officials in this case, stated that "the standard of review is paramount" to the result in this case. Pet. App. 11a. It then concluded that the standard of review developed in *Turner* should apply to all claims of racial discrimination in the prison setting. Pet. App. 11a-12a.[4]

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[4] The Ninth Circuit conceded that *Turner* may not apply to Eighth Amendment challenges. Pet. App. 12a n.6.

This conclusion is faulty because, as set forth below, this Court has applied *Turner*'s standards only to a specific subset of constitutional challenges to prison policies and regulations.

Although the Court has not been explicit in describing why it has applied *Turner* to some prisoner claims but not others, a consideration of the Court's decisions suggests the principle at work. In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court set forth the basic rationale for applying the *Turner* standards to prisoner constitutional rights, namely when the right in question is in intrinsic tension with the necessities of confinement:

> Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.

539 U.S. at 131 (citations omitted).

Thus, this Court has acknowledged that there is a continuum of constitutional rights, some of which are more compatible with the exigencies of imprisonment than others. In the cases in which the Court has applied the *Turner* standard, the challenged regulation has restricted a prisoner's active exercise of rights; these cases have involved rights to free expression, rights to expressive or intimate associations, rights to refuse medical care, and rights to petition for redress of grievances.[5]

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[5] All of the cases in which the Court has applied *Turner* involve either First Amendment or Due Process interests. In *Turner* itself, the Court considered regulations involving prisoner-to-prisoner correspondence and the right to marry. *Turner*, 482 U.S. at 81. Prisoner correspondence rights are obviously grounded in the First Amendment,

These applications of *Turner* reflect the fact that incarceration necessarily restricts prisoners' ability to exercise free will in myriad dimensions: prisoners lose control over where they will live and with whom; what work they will perform; when they will eat and sleep; and other aspects of their lives that ordinarily are matters of private choice. In all the cases in which this Court has applied *Turner*, the rights at stake were ones that are actively exercised, rather than rights that a person simply enjoys.

In contrast, Eighth Amendment rights are "enjoyed" rather than "exercised;" they are passive rights that serve only as limits on the power of the government:

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see Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989), while the right to marry is based on the Due Process Clause, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In *Overton v. Bazzetta*, 539 U.S. 126 (2003), as noted *infra* p. 19, the Court applied a *Turner* analysis to a claim that prison regulations limiting visitation infringed on prisoners' associational rights. Associational rights have both First Amendment and Due Process components. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (citing both Due Process and First Amendment cases in recognizing a right of intimate association).

As noted *infra* note 6, the Due Process interest at stake in *Washington v. Harper*, 494 U.S. 210 (1990), was the right to freedom from bodily restraint. In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court considered a challenge to prisoners' right of access to courts, a right founded on both the First Amendment and the Due Process Clause. *Id.* at 346.

All of the remaining cases have involved only First Amendment claims. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court considered a challenge to a prison policy that barred Muslim prisoners from attending weekly religious services. *Id.* at 345. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court considered a First Amendment challenge to restrictions on prisoners' receipt of publications. *Id.* at 403. In *Shaw v. Murphy*, 532 U.S. 223 (2001), the Court applied a First Amendment analysis to a prisoner's asserted right to provide legal assistance to other prisoners. *Id.* at 231.

> In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "take reasonable measures to guarantee the safety of the inmates."

Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citations omitted). Similarly, restrictions on the government's ability to punish arbitrarily, restrictions founded in the Due Process Clause, also act as restraints on governmental power rather than as protections for individual volitional interests. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is the protection of the individual against arbitrary action of government."). These rights are violated regardless of a person's expressed objection to exercise of governmental power. For example, it would not be constitutional for the government to execute someone for the crime of shoplifting, even if that person did not object.

It is difficult to apply the *Turner* standard to passive rights such as the right to be free from cruel and unusual punishment. As noted, one of the four prongs of the *Turner* standard involves consideration of "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Eighth Amendment rights are either recognized or denied; it is as difficult to imagine an alternative way to exercise one's Eighth Amendment rights as it is to imagine how to be a little bit pregnant.

These considerations help to explain why the Court has never applied its four-pronged test to cases in which prisoners have challenged policies that implicate only the

limits of governmental power to punish prisoners. *See Hope v. Pelzer*, 536 U.S. 730 (2002) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a challenge to a prison regulation that allowed disciplining a prisoner by shackling him to a rail); *Sandin v. Conner*, 515 U.S. 472 (1995) (analyzing under the Due Process Clause, without reference to *Turner* standards, a challenge to a prison disciplinary hearing); *Farmer v. Brennan*, 511 U.S. 825 (1994) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner claim that authorities failed to provide necessary safety); *Helling v. McKinney*, 509 U.S. 25 (1993) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner challenge to exposure to second-hand smoke); *Hudson v. McMillian*, 503 U.S. 1 (1992) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner challenge to use of force); *Wilson v. Seiter*, 501 U.S. 294 (1991) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner challenge to a variety of conditions of confinement).

It is true that the distinction between rights that one "exercises" and rights that one "enjoys" blurs on the margins, but the Court has resolved this blurriness by looking at the way the prisoner frames the issue. Thus in *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court analyzed a regulation allowing a potentially permanent ban on prisoner visitation under the Eighth Amendment without reference to *Turner* standards. At the same time, the Court separately applied a *Turner* analysis to the claim that this regulation, as well as other regulations limiting prisoners' visits with family members and friends, infringed on the prisoners' associational rights. *Overton*, 539 U.S. at 130-36.

Similarly, in *Washington v. Harper*, 494 U.S. 210 (1990), cited by the court below as the rationale for applying *Turner* analysis to all prisoner regulations, *see* Pet. App. 12a, the prisoner framed his claim as a right to refuse psychotropic

medications, which is an aspect of freedom from bodily restraint protected by the Due Process Clause,[6] and the Court applied *Turner* standards in determining the result. *Id.* at 223-26. By contrast, although the prisoner's claim regarding a prison policy of handcuffing prisoners to a rail in *Hope v. Pelzer* could have been characterized as an issue of freedom from bodily restraint, the prisoner invoked the Eighth Amendment, and the Court did not apply *Turner*. *Hope*, 536 U.S. at 733.

While the line between rights one "exercises" and rights one "enjoys" may not always be clear, the right not to be subjected to governmental classifications on the basis of race is unambiguously a right that is "enjoyed," like the right not to be subjected to arbitrary or cruel and unusual punishment. Moreover, freedom from segregation on the basis of race is not in tension with the necessities of confinement, and is completely "compatible with incarceration," *Overton*, 539 U.S. at 131; racial segregation is not necessary to any penological purpose. Further, as is the case with Eighth Amendment claims, it is difficult to conceptualize how the entire *Turner* standard can be applied in a meaningful way to racial segregation claims. A prisoner subjected to racial segregation, for as long as that segregation lasts, is entirely deprived of the right not to be classified by race at the hands of the government. Like prisoners who are currently being subjected to cruel and unusual punishment, prisoners segregated by race are not provided with an

[6] *Washington v. Harper* cites *Youngberg v. Romeo*, 457 U.S. 307 (1982), for the proposition that avoiding the administration of psychotropic medication implicates a constitutional right. *Harper*, 494 U.S. at 221-22. At the point cited, *Youngberg* characterizes the constitutional claim as "a right to freedom from bodily restraint." 457 U.S. at 316.

alternative means of exercising their rights by the prospect that the infringement will end at some future point.[7]

Indeed, a clear marker that the Fourteenth Amendment's Equal Protection clause operates as a restriction on the powers of the government is that the constitutionality of racial segregation by governmental command does not depend on the agreement or disagreement of those affected by the governmental action. *Brown v. Bd. of Educ.*, 349 U.S. at 300 ("But it should go without saying that the vitality of these constitutional principles [regarding elimination of racial segregation in schools] cannot be allowed to yield simply because of disagreement with them."). The rationale for the *Turner* standard, developed in a context in which the limitations on constitutional rights are necessitated by imprisonment, does not justify its application to Equal Protection challenges to racial segregation.

B. The *Turner* standard would give too little weight to the interest in eliminating racial discrimination

In *Lee v. Washington*, 390 U.S. 333 (1968), this Court issued a *per curiam* affirmance of a three-judge court order declaring unconstitutional Alabama statutes requiring racial segregation in prisons and jails. Indeed, the Court characterized the argument that such statutes were constitutional as "without merit." *Id.* As a result of *Lee*, prisons and jails across the country were desegregated.

Notably, the rationales of California prison administrators for imposing racial segregation in classification cannot be distinguished from those of the prison

[7] *Cf. Blevins v. Brew*, 593 F. Supp. 245, 247 (W.D. Wis. 1984) (awarding damages to a prisoner subjected to racial segregation in housing during his initial classification, even though the prisoner was allowed to participate in daily program activities with other prisoners on a non-racial basis when he was out of his cell).

administrators a generation ago who claimed that ending enforced racial segregation in prisons and jails would lead to violence. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 190-91 (5th Cir. 1994) (prison officials testified that racial segregation in two-man cells at the Louisiana State Penitentiary at Angola was "motivated by security concerns and the past incidents of violence between black and white prisoners;" prison guards were unable to monitor visually the two-man cells at all hours of the night; prisoners in Angola are "the worst of the worst;" two instances occurred in which black and white prisoners housed together became violent; racial supremacy groups existed within the prison ranks; and interracial conflicts may have triggered more generalized racial violence); *United States v. Wyandotte County, Kan.*, 480 F.2d 969, 971 (10th Cir. 1973) (*per curiam*) (jail administration attempted to justify policy of assigning prisoners to the "tanks" on the basis of race because those placed in tanks were "hardened criminals" with a propensity for violence); *Blevins v. Brew*, 593 F. Supp. 245, 246-49 (W.D. Wis. 1984) (incoming prisoners at FCI-Oxford were segregated by race when double-celled; ordinarily staff did not have an opportunity to review the central files of incoming prisoners before they arrived, or to interview them before their first housing assignment; on the day following admission, prisoners could request adjustment of their housing assignment, and the prison did not consider race in making such adjustments; prison official testified that he was aware of growing prominence within prisons of groups advocating racial hatred, and that he believed that he would be subjecting prisoners to a substantial risk of injury if he placed two prisoners of different races in the same cell); *McClelland v. Sigler*, 327 F. Supp. 829, 830 (D. Neb. 1971), *aff'd*, 456 F.2d 1266 (8th Cir. 1972) (white prisoners were housed in West Cell Hall if they objected to living with black prisoners; East Cell Hall housed prisoners of all races; prison warden testified that putting blacks in the West Cell Hall would cause "uncontrollable trouble" between the races, that following sexual assault by black prisoner on white prisoner there was

a sit-down strike in the mess hall, that a small percentage of black prisoners has a tendency to prey on young, weak white men, and that racial tension resulting in an assault on a guard had been the subject of legislative hearings); *cf. Rentfrow v. Carter*, 296 F. Supp. 301, 302-03 (N.D. Ga. 1968) (ten prisoners at the Georgia State Prison, five white and five black, asked court to stop racial desegregation of penal institutions ordered by federal court on the ground that violence would result from order and that prisoners from both races would violently resist racial desegregation; the prisoners alleged that "frequent and violent killings" occurred in the prisons and that there was an "acute shortage of custodial officers").

If, in the cases discussed above, the courts had allowed prison officials' mere assertions of potential racial violence permanently to defeat Equal Protection claims, it is highly likely that a large segment of the nation's prisons would not have been desegregated, and our prisons and jails would have become the one set of public institutions in the country in which racial segregation retained official sanction. It is even likely that many prisons and jails would remain racially segregated to this day, a living fossil of the racial caste system that disgraced our country.

Applying the *Turner* standard to claims of racial segregation would make it too easy to conceal racial animus under the cloak of deference to correctional officials.[8] If the Court were to apply a *Turner* standard to claims of racial segregation, courts would be forced to apply the same deferential standard to claims of outright racial discrimination. Indeed, as recently as 2002, California's prison system subjected "Southern Hispanics" to a lockdown

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[8] Not even Congress is entitled to deference when courts review race-based policies. *See, e.g., Adarand*, 515 U.S. at 235 (overruling *Fullilove v. Klutznick*, 448 U.S. 448 (1980) to the extent that it required anything less than strict scrutiny for federal racial classifications).

lasting over a year solely on the basis of their perceived ethnic identification. Pet. App. 16a n.9. Assigning prisoners to the severely restricted conditions of "lockdown" confinement for over a year solely on the basis of ethnicity or race should not carry a presumption of constitutionality, as application of the *Turner* standard would require.[9] This standard would make rank discrimination too easy to defend.[10]

C. The *Turner* standard is too blunt a tool for application to racial segregation claims

The court below reasoned that, under *Turner*, it did "not have to agree that the policy actually advances the [California Department of Corrections'] legitimate interest but only 'whether the defendants might reasonably have thought that the policy would advance its interests.'" Pet. App. 22a. Given the substantial public interest in avoiding racial segregation, the *Turner* standard fails to allow the careful balancing of countervailing public interests that should inform judicial review of racial classifications.

In particular, the *Turner* standard allows courts to ignore substantial evidence that policies of racial discrimination actually promote violence. *See, e.g.*, Chad Trulson, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prison*, 37 Law & Soc'y Rev.

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[9] *See, e.g., Overton*, 539 U.S. at 132.

[10] The dissent from the denial of rehearing *en banc* provides a hypothetical policy that would be protected from serious scrutiny under the standard followed in the court below: prison officials could decide that prisoners could be barred from visitation with spouses and children if they appeared to be of a different race, on the ground that such visits would lead to unrest in the racially charged atmosphere of a prison. "The prisoner would have to prove that there would *not* be a riot . . . . It is certainly 'plausible' that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could potentially lead to conflict." Pet. App. 43a-44a (citation omitted).

743, 774 (2002) (a study of ten years of data from the Texas Department of Criminal Justice in the aftermath of desegregation of double cells indicates that, over the long term, the rate of violence between prisoners segregated by race in double cells surpassed the rate among those racially integrated).

The Ninth Circuit, in approving the California prison system's policy of deliberate racial segregation, relied on testimony of an Associate Warden that, if race were not considered in making initial housing assignments, "she is certain that there would be racially based conflict in the cells and in the yard." Pet. App. 4a. In fact, the prison officials' own evidence supports the hypothesis that violence results from the prevalence of gangs rather than from racial tensions. The court of appeals described seven specific incidents, all of which involved gang-related violence. In one of these incidents, the gang-affiliated white prisoners attacked white prisoners not affiliated with gangs. Pet. App. 16a-17a n.9. While gang membership may be a good surrogate for ethnic identification, the more important questions are whether ethnic identification is similarly a good surrogate for gang membership, or for a proclivity for interracial violence. The court below, however, does not address these issues. Moreover, the seven incidents cited by the court below involve a total of perhaps 700 prisoners. Given that the population of the California prison system exceeds 164,000, this record is lacking a critical link between the global policy of racial segregation and the asserted justification.

Aside from the serious question of the extent to which the evidence cited by the court of appeals demonstrates a pervasive level of racial tension in the California prison system, the evidence cited also raises the question of whether segregation by race or ethnicity even curbs racial violence. Segregation of incoming prisoners sends a powerful signal that prisoners of other races are so dangerous that safety lies in sticking with one's "own kind." As a result, segregation of

new prisoners by race during the initial classification process facilitates the recruitment of new gang members. Moreover, the poor fit between racial identification and membership in a particular gang is underlined by the notorious rivalry between the Crips and the Bloods, two African-American gangs. *See, e.g.*, Alan Elsner, *Gates of Injustice: The Crisis in America's Prisons* 39 (2004) (noting that Crips and Bloods members in prison "continue to wage endless war" against each other).[11] Putting a Crip and a Blood together in a cell is at least as dangerous as putting members of two different ethnic groups in the same cell. Accordingly, segregating new prisoners by race is both extraordinarily overinclusive and underinclusive as a technique to prevent prison violence.

Given the strong public interest in avoiding official racial segregation, evidence that such segregation is unnecessary and even harmful is critically important. Because application of the *Turner* standard would cause courts to discount such evidence, the Court should reject *Turner*'s application here.

D. The *Turner* standard is unnecessary to protect the interest in maintaining prison safety and security

In *Lee v. Washington*, this Court noted that it read the order from the lower court as making "allowance for the necessities of prison security and discipline." 390 U.S. at 333-

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[11] Gangs of one ethnic group will fight with gangs whose membership has the same ethnic profile while allying with gangs of different ethnic backgrounds. "The Aryan Brotherhood has a working relationship with the Mexican Mafia and the Dirty White Boys, an Anglo offshoot of the Texas Syndicate. It also uses Nazi Low Riders, a mixed White-Hispanic gang to do some of its dirty work. The Black Guerrilla Family has an active working relationship with La Nuestra Familia but wages war against the Aryan Brotherhood and the Mexican Mafia." Elsner, *supra*, at 41-42. Thus, noting that a prisoner has a given ethnic identity does not necessarily identify from whom that prisoner is at risk.

34. In a concurring opinion, Justice Black stated that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails," while carefully noting that this qualification did not dilute the prohibition against racial discrimination. *Id.* at 334 (Black, J., concurring).

In the district court decision in *Lee* itself, the three-judge court had noted that "the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." *Washington v. Lee*, 263 F. Supp. at 332 (internal citation omitted). The result of that consideration was not, however, to allow the constitutional principle to be compromised, but rather to design an order giving the responsible officials a reasonable period of time to plan a phased-in desegregation plan. *Id.*

In cases subsequent to *Lee*, when there has been real evidence that the goal of elimination of racial segregation was in significant tension with the maintenance of security and control, the federal courts have required that the responsible officials take the necessary steps to assure both reasonable safety and fidelity to constitutional principles. Thus, in *Mickens v. Winston*, 462 F. Supp. 910 (E.D. Va. 1978), jail officials claimed that their policy of using portions of the facility to house black detainees, while other sections held detainees of all races, was necessary to maintain racial balance in integrated housing units. The jail's housing units included large dormitory-style units, in addition to tiers of individual cells, and only one guard was on duty per shift. *Id.* at 911-12. Although the court noted that, under those circumstances, jail officials faced a "difficult, if not impossible, task of affording appropriate supervision," *id.* at 912, the court concluded that the solution lay in proper supervision of all the prisoners;

providing enough personnel to protect the physical security of all prisoners would also allow racial integration. *Id.* at 913.

Similarly, in *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993), racial tensions were one significant factor in producing a riot at the Southern Ohio Correctional Facility that resulted in ten deaths. Moreover, prisoner security records had been destroyed in the riot. As a result, following the riot, officials began assigning prisoners to cells on the basis of race. The officials also requested modification of a consent decree requiring that cell assignments be made without regard to race. Under these particularized circumstances, the court appropriately granted a temporary modification of the consent decree to allow the implementation of a plan that would allow the prison to return to full integration while still providing reasonable safety:

> Without records necessary to accurately classify prisoners' security status, in the midst of an investigation into the riot by law enforcement agencies, and in the face of high post-riot racial tensions, we conclude that forcing the Defendants to comply with the terms of the Consent Decree could lead to a renewed state of emergency.
>
> . . . .
>
> . . . Thus, the Defendants must be first given a reasonable time to reconstruct the records which were destroyed during the riot. Without the crucial information lost in those records, attempting integration could be dangerous to both staff and prisoners, and thus, random celling cannot proceed according to the consent decree.
>
> . . . .
>
> . . . Evidence developed at the hearing established that a great percentage of the inmates at SOCF are from urban areas, and a majority of whom are African-American. Conversely, ninety per cent of the staff at SOCF is white, from rural areas, with little or no experience in relating to minorities from urban environments.
>
> . . . .
>
> . . . With a time table and clearly defined goals [for a return to completely integrated housing assignments over a defined period of time], along with the sensitivity training for the staff mandated by the Court, we find the modification satisfactory, as well as unavoidable.

Id. at 1133-34. Significantly, however, the modification approved by the court envisioned a return to non-racial operation. While particularized circumstances may require a temporary suspension of full racial integration, California's policy is unconstitutional because it contemplates permanent racial segregation within the system. Every temporary suspension of the prohibition against racial segregation should envision an end date.

Nothing in *Lee v. Washington* requires a court to ignore security concerns. Indeed, as a result of *Lee*, the nation's jails and prisons were successfully integrated. There is no need for the federal courts to apply a *Turner* standard to have the tools they need to assure that legitimate security needs are recognized.

CONCLUSION

The decision of the court below to apply the *Turner* standard rather than "strict scrutiny" was outcome-determinative, as the court below acknowledged. Under an appropriate application of the "strict scrutiny" standard, California has failed to justify its policy, which it has followed for twenty-five years, of segregating incoming prisoners by

race during the classification process. For the above reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FORMER STATE CORRECTIONS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former senior state corrections officials who have extensive experience in prison management matters. *Amici* believe that the California Department of Corrections' ("CDC") policy at issue in this case, which segregates prisoners by race in assignment to double cells in reception centers at CDC facilities, is premised on archaic assumptions about the relationship between racial integration of cells and interracial violence in prison – assumptions that are at odds with the latest empirical evidence on the subject and the current professional judgment of corrections officials nationwide. The *amici* are as follows:

Walter J. Dickey served as Administrator of the Wisconsin Division of Corrections from 1983 through 1987, and as Chair of Wisconsin Governor Tommy Thompson's Task Force on Corrections in 1996-97. In addition, Mr. Dickey was a member of the United States Department of Justice Executive Sessions on Sentencing and Corrections from 1997 through 2001. A widely published author on corrections issues, Mr. Dickey presently is the Evjue-Bascom Professor of Law at the University of Wisconsin-Madison Law School, where he has taught since 1976.

David C. Evans served as Commissioner of Corrections in Georgia from 1976 to 1990, and as Chairman of the Georgia Juvenile Justice Board from 1999 to 2001. In

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

addition, Mr. Evans was President of the Association of State Correctional Administrators from 1986 to 1990. Mr. Evans has taught corrections at the graduate school level, and, at present, is a private consultant on corrections matters.

Larry Fields has 32 years of experience in the corrections field. Mr. Fields served as Director of the Oklahoma Department of Corrections from 1992 to 1996. Prior to that time, Mr. Fields was a warden at both maximum and minimum security correctional facilities in Oklahoma. At present, Mr. Fields is a consultant on issues related to private prisons.

Patrick D. McManus has 37 years of experience in the corrections field. Mr. McManus served as Assistant Commissioner of Corrections for Minnesota from 1974 to 1979, and as Director of Corrections for Kansas from 1979 to 1983. In addition, Mr. McManus has served as a special master or independent court monitor in several prison cases nationwide. Over the past decade, Mr. McManus frequently has been retained as an expert on corrections management matters for the United States Department of Justice.

Margaret Pugh has 32 years of experience in the corrections field. Ms. Pugh served as Commissioner of the Alaska Department of Corrections from 1995 to 2002, and as Southeast Alaska Regional Director of Corrections from 1985 to 1990. Prior to holding those posts, Ms. Pugh was Superintendent of both a maximum security correctional facility and a local jail in Alaska. At present, Ms. Pugh speaks on correctional issues at conferences around the country.

Chase Riveland served as Secretary of Corrections for the state of Washington from 1986 to 1997, Executive Director of the Colorado Department of Corrections from 1983 to 1986, and Deputy Director of the Wisconsin Department of Corrections from 1982 to 1983. At present, Mr. Riveland teaches corrections-related courses at the National Institute of Corrections Academy in Colorado, and serves as an independent corrections consultant.

SUMMARY OF ARGUMENT

This Court has steadfastly maintained that all racial classifications are inherently constitutionally suspect, no matter the setting in which they are employed, and that therefore they must be subjected to strict scrutiny, the most exacting standard of constitutional review. Applying that standard, the Court repeatedly has admonished that racial classifications cannot be predicated solely on generalized assertions that they are necessary to serve some larger social good, but rather, must be rooted in a strong empirical foundation. The CDC policy of racial segregation of inmates in double cells in prison reception centers contravenes this core constitutional tenet. The policy is based entirely on the factually unsubstantiated assumption that racial segregation of those cells is necessary to prevent interracial violence. It is not supported by any evidence showing that racial integration of prison cells leads to greater interracial violence.

In fact, an emerging body of social science scholarship casts great doubt on the validity of the assumption underpinning the CDC's policy of racial segregation. First, a

pioneering study on the impact of the desegregation of the Texas prison system (which, like California's system, is enormous, as well as racially and ethnically diverse), reveals that interracial violence within Texas correctional facilities has declined dramatically as racial integration of inmate cells has increased. Second, the results of a seminal recent survey reveal that the vast majority of wardens at maximum security institutions across the country believe that interracial violence in prisons diminishes with racial integration of cells. The Texas study and the wardens' survey come as no surprise to the *amici*. Based on their extensive experience in the corrections field, *amici* firmly believe that racial integration of cells generally diffuses racial tensions in prisons. Simply put, it is the professional judgment of the *amici* that CDC's rigid and blunderbuss policy of segregating every double cell in every reception center in the California prison system is contrary to sound prison management.

ARGUMENT

I. THE CDC'S POLICY OF RACIAL SEGREGATION OF DOUBLE CELLS IN INMATE RECEPTION CENTERS IS BASED ON AN UNSUBSTANTIATED ASSUMPTION THAT THE POLICY IS WARRANTED TO PREVENT INTERRACIAL VIOLENCE AND THUS CONTRAVENES THE CORE CONSTITUTIONAL TENET THAT RACIAL CLASSIFICATIONS NEVER CAN BE JUSTIFIED ON BALD ASSERTIONS OF NECESSITY.

The CDC classifies prisoners according to race when assigning them to double cells (*i.e.*, cells that house two inmates) in a prison's reception center for the initial 60 days

of incarceration following their arrival at, or transfer between, CDC institutions. Pet. App. 2-3a. While race is ostensibly only one factor in the CDC's double cell placement decisions in reception centers, the CDC has acknowledged that "the chances of an inmate being assigned to a cell mate of another race is pretty close to zero percent." *Id.* at 3a (internal quotations omitted). In short, race is the dispositive factor in assignments to double cells in California's reception centers, and the CDC policy is one of strict racial segregation of those cells.

The asserted purpose of the CDC's policy of racially segregating inmates in reception centers is to prevent racial violence from breaking out. *Id.* at 4a, 14a. This policy is not based, however, on evidence that racial violence was prevalent in reception centers in CDC institutions prior to the adoption of the policy, or that racial violence would be prevalent there today were prisoners of different races assigned to the same cell. Nor is the policy based on evidence that racial violence is prevalent in prison systems where racial integration of cells is the norm. Rather, the policy rests on the CDC's raw assumption that racial violence indisputably would ensue were double cells in reception centers racially mixed.

The sweeping statements of an Associate Warden at one CDC institution underscore the complete lack of evidentiary foundation for the CDC's policy of racial segregation in double cell assignments in reception centers. The Associate Warden baldly declared that, in the absence of the policy, she was "certain that there will be conflicts both in the cells and the conflict will flow into the yards." JA App.L, at 310a. This risk is so great, the Associate Warden proclaimed, that even sub-groups within larger ethnic groups should not be housed together in

prisons: "You can not house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it." JA App.H, at 189a.

The CDC offered no factual support for the Associate Warden's pronouncements about race. It furnished not one study or iota of statistical proof bearing on the relationship between integrated jail cells and interracial violence in prisons. It did not even come forward with specific episodes, from California or elsewhere, of interracial violence between inmates in racially integrated cells. The CDC simply presumes that inmates of different races cannot exist peacefully together in double cells in reception centers, and invariably will react violently if they are co-mingled there.

Because the Court considers all racial classifications to be inherently constitutionally suspect, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), it repeatedly has rejected unsubstantiated pronouncements that a racial classification is necessary to serve an asserted larger social good. For example, when evaluating the constitutionality of a municipal program that used racial classifications in the allocation of public contracts as a remedy for purported discrimination against local minority contractors in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court refused to accept "highly conclusionary statement[s"] that this discrimination existed. *Id.* at 500. The Court's message was clear: "When [the government] chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. [It] cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. The history of racial

classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* at 501. In light of these core constitutional tenets, the Court in *Croson* demanded empirical evidence, not mere assertions, of the existence of the discrimination that the race-based contracting program sought to remedy. Because the Court found such evidence missing, it held the program unconstitutional.

Likewise, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court did not reflexively credit the assertions of proponents of race-based university admissions policies designed to foster academic diversity that such policies enhance the quality of the educational environment. Rather, the Court demanded empirical evidence that promoting racial diversity on college campuses actually benefits students. *Id.* at 330.

Naked assertions about the need for racial classifications in the prison setting have fared no better at the Court. In a short per curiam opinion in *Lee v. Washington*, 390 U.S. 333 (1968), the Court affirmed a three-judge district court decision that had flatly rejected Alabama's factually unsupported assertion that racial segregation of inmates was imperative to the maintenance of "security [and] discipline" in the state's penal system. 263 F. Supp. 327, 331 (M.D. Ala. 1966). The Court in *Lee* did not foreclose prison officials from resorting to racial classifications under "particularized circumstances" to quell "racial tensions" that threaten "security and discipline." 390 U.S. at 334 (Black, J., concurring); *see* 263 F. Supp. at 331 ("We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period.");

see also Croson, 488 U.S. at 521 (Scalia, J., concurring) ("imminent danger to life and limb" posed by a "prison race riot" may justify "temporary segregation of inmates"). By the same token, however, the Court did not give prison officials *carte blanche* to institute racial segregation of inmates based only on vague suppositions that racial integration would cause disorder.[2]

Here, the Ninth Circuit believed it was free to discount this line of precedents, because in its view, *Turner v. Safley*, 482 U.S. 78 (1987), established a special and highly deferential standard of judicial review applicable to all cases in which the actions of prison officials come under constitutional attack, even when those actions involve the use of racial classifications. Pet. App. 12-13a. Applying that lenient standard, the Ninth Circuit did not challenge the assumptions underlying the CDC's policy of racial segregation in double cell assignments in reception centers, and it upheld the policy.

As the Petitioner has forcefully argued, the Ninth Circuit misread *Turner*. Consistent with this Court's refrain that *all* racial classifications, no matter the setting, are inherently suspect, the CDC's policy of racial segregation must be subjected to strict scrutiny, the most exacting standard of constitutional review. In the remainder of this brief, we show that the CDC's assumption that racial

[2] In the decades since *Lee*, many lower courts have rejected unsubstantiated assertions that racial classifications adopted by prison officials were necessary to preserve order. *See, e.g.*, *Stockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994); *United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir. 1973); *White v. Morris*, 811 F. Supp. 341, 344 (S.D. Ohio 1992); *Abbot v. Smaller*, 1990 U.S. Dist. LEXIS 11961 at *8 (E.D. Pa. 1990); *Holt v. Hutto*, 363 F. Supp. 194, 203 (D. Ark. 1973), *rev'd on other grounds*, 505 F.2d 194 (8th Cir. 1974).

integration of double cells in reception centers will breed greater interracial violence conflicts with an emerging body of social science scholarship. *Amici* thus join the Petitioner in urging the Court to reverse the Ninth Circuit's decision and remand the case so that the CDC's policy of racial segregation can be measured against the proper standard, and the recent empirical evidence on the relationship between integrated jail cells and interracial violence can be considered as part of the searching constitutional examination that is required.[3]

[3] Pointing to "numerous instances of racial violence that have caused" the CDC prison at Pelican Bay "to be on lockdown for most of the last couple of years," the Ninth Circuit said the CDC was not "acting on an unsubstantiated record" in adopting its policy of racial segregation of double cells in reception centers. Pet. App. 16-17a n.9. As the Petitioner has observed, however, Pelican Bay is a unique facility that houses extremely violent male convicts, many of whom are members of notorious gangs. Because a racial classification must be narrowly tailored to address the particular problem that prompted recourse to the classification, *see Croson*, 488 U.S. at 506-08, at most, these episodes of violence at Pelican Bay suggest that a targeted approach at Pelican Bay may be warranted. In no way, however, do they support the CDC's blunderbuss dictate that every double cell in every reception center in the California system must be racially segregated. In any event, the episodes of violence at Pelican Bay to which the Ninth Circuit pointed include instances of intraracial conflict, with Hispanics fighting other Hispanics and Asians fighting other Asians. Pet. App. 16-17a n.9. The problems at Pelican Bay, therefore, would appear to transcend race.

II. THE ASSUMPTION UNDERLYING THE CDC'S POLICY OF RACIAL SEGREGATION OF DOUBLE CELLS IN INMATE RECEPTION CENTERS – THAT RACIAL INTEGRATION OF THOSE CELLS WILL BREED GREATER LEVELS OF INTERRACIAL VIOLENCE – IS AT ODDS WITH RECENT EMPIRICAL EVIDENCE AND THE EVOLVING PROFESSIONAL JUDGMENT OF CORRECTIONS OFFICIALS NATIONWIDE.

After this Court's decision in *Lee v. Washington*, formerly segregated prison systems were under a constitutional obligation to desegregate. Until recently, the assumption that racial integration would cause heightened interracial violence in prisons had not been tested rigorously in the academic literature on prison management, even as lower courts enforced the desegregation mandate of *Lee* and integration of formerly segregated prisons took hold.

In the past few years, however, this void has been filled by a pathbreaking study on whether the court-ordered desegregation of the Texas prison system in 1977 has led to an increase in interracial violence. This study, authored by two criminal justice scholars, shows that it has not. Separately, another group of criminal justice scholars has conducted a landmark survey seeking the views of wardens nationwide on the asserted connection between racial integration of cells and interracial violence in prisons. The survey reveals that a vast majority of wardens believe that racially integrated jail cells do not produce increased levels of interracial violence, and, in fact, may well cause interracial violence to decrease. Together, the Texas study and the wardens' survey undermine the assumption on which the CDC's policy of racial segregation of double cells in reception centers is predicated.

A. The Recent Comprehensive Study On The Impact Of The Racial Integration Of The Texas Prison System Casts Great Doubt On The Validity Of The CDC's Assumption That Racial Segregation Of Double Cells In Reception Centers Is Necessary To Prevent Interracial Violence In Prisons.

The authors of the Texas study, Professors Chad Trulson and James Marquart, sought to examine the impact of the 1977 federal court decree requiring the desegregation of the Texas prison system. Chad Trulson & James W. Marquart, *Inmate Racial Integration: Achieving Racial Integration in the Texas Prison System*, 82 Prison Journal 498, 503 (2002). In the *amici's* view, this study represents the most comprehensive scholarly effort to date to determine whether there is a connection between racially integrated jail cells and heightened levels of interracial violence in prisons.

The Texas study is particularly salient here because of the substantial similarities between the California and Texas prison systems. Both systems are enormous: California has the nation's largest state prison system, and Texas the second. *See* Paige M. Harrison & Jennifer Karberg, Bureau of Justice Statistics Bulletin: Prison and Jail Inmates at Midyear 2002 (U.S. Dept. of Justice, April 2003), at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf. Moreover, there is wide ethnic diversity in the prison population of both states, with African-Americans, Latinos, and Caucasians represented in significant numbers in the California and Texas systems. *Id.* at 13, Table 16. Finally, like the CDC today, which maintains that integration of double cells in reception centers would lead to increased interracial violence, Texas officials

presumed that desegregation of the Texas prison system would lead to increased interracial violence. Indeed, according to Trulson and Marquart, it was this lingering assumption that prompted the Texas Department of Corrections ("TDC") to resist full compliance with the desegregation mandate for more than a decade following the 1977 decree. Chad Trulson & James Marquart, *Racial Desegregation And Violence In the Texas Prison System*, 27 Crim. Justice Rev. 233, 241 (2002).[4]

Over time, the threat of judicially imposed fines compelled the TDC to carry out the court's desegregation mandate. *Id.* By the end of 1991, 30% of the two-person cells in the Texas system were racially mixed. *Id.* By the end of 1999, that figure had risen to 62%. *Id.*

To measure the correlation between racially integrated cells and interracial violence in Texas, Trulson and Marquart collected data concerning inmate-on-inmate assaults that occurred in Texas' maximum security facilities, which house the most violent convicts, from 1990[5] through 1999. This data was culled from Incident Data Forms ("IDFs"), which the TDC itself had designed to support its position that race should be considered in making inmate cell assignments to preserve order. *Id.* at 244. Among other things, the IDFs contained information

[4] The decree established a race-neutral method for assigning inmates to cells. To facilitate desegregation, the decree established numeric goals for the racial and ethnic composition of housing units within Texas prisons. Trulson & Marquart, 82 Prison Journal at 504.

[5] Trulson and Marquart selected 1990 as the start date for their study because, in their view, Texas did not really begin to comply with the desegregation mandate until then.

on whether the reported assault was interracial or intraracial, and whether the incident was between cell mates or between inmates who were housed in different cells. *Id.*

Trulson and Marquart first examined assaults occurring between all inmates, cell mates and non-cell mates alike. During the decade covered by the study, 39,237 inmate-on-inmate assaults were recorded on the IDFs. In each year, intraracial assaults accounted for a larger percentage of the total assaults. *Id.* at 245. For the entire period, the rates of both intraracial and interracial inmate-on-inmate assaults declined dramatically. *Id.* The authors described their findings as follows:

> [T]he overall trend . . . for interracial inmate-on-inmate assaults shows a gradual decline starting in 1993 and continuing rapidly into 1994 with eventual stability around 14 to 16 incidents per 1000 inmates . . . The overall inmate-on-inmate assault rate has declined since the introduction of desegregation – despite a one-year increase in the interracial rate in 1991 (from 35 to 39 per 1,000 inmates interracial and a drop from 48 to 47 intraracial). **Essentially, the data . . . suggest that desegregation did not result in a disproportionate increase in prisoner violence, either interracial or intraracial. That is, the onset and continuation of desegregation did not parallel an increase in racial or nonracial violence. Rather, violence decreased over the decade.**

Id. at 245-46 (emphasis added).

Trulson and Marquart next examined data on assaults between cell mates in both racially mixed and racially homogenous cells. Of the total number of assaults reflected

in the decade-worth of IDFs examined by Trulson and Marquart, 6,549 involved cell mates. Fifty-two percent of these assaults were interracial and forty-eight percent were intraracial. *Id.* at 248-49. After controlling these raw figures to account for population differences,[6] Trulson and Marquart determined that the assault rates in integrated cells were roughly comparable to the rates in non-integrated cells. Indeed, the adjusted figures showed that the rate of intraracial assaults in cells was marginally larger. *Id.* Trulson and Marquart found that the highest rate of interracial assaults involving cell mates took place in 1991-92, during the initial period of integration. *Id.* Overall, however, intraracial assaults involving cell mates occurred at a greater rate than interracial assaults involving cell mates in each year, with the exceptions of 1991, 1992, and 1994. *Id.*

Just as all assaults occurring outside of prisons that involve perpetrators and victims of different races are not necessarily racially motivated, all assaults in racially integrated cells are not necessarily racially motivated either. To account for this basic fact, Trulson and

[6] From 1993 onward, there were more inmates living in integrated double cells than in non-integrated double cells in the subject population, which would lead one to expect that, all else being equal, there would be a greater raw number of assaults between integrated cell mates. To control for this factor, Trulson and Marquart compared the annual *rate* of assaults per one thousand inmates in the integrated and non-integrated populations, in addition to noting the raw numbers. To do this, they started with the raw number of incidents in each population (integrated and non-integrated), divided it by the number of inmates in that population, and multiplied the resulting number by 1,000. Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 37 Law & Soc'y Rev. 743, 763-64 (2002).

Marquart sought to distinguish racially motivated interracial assaults involving cell mates from non-racially motivated interracial assaults involving cell mates. Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 Law & Soc'y Rev. 743, 774 (2002). Again relying on data generated by the TDC during the decade covered by their study, Trulson & Marquart found that only 10% of all interracial assaults in cells were categorized by the TDC as being racially motivated. *Id.* at 768. Moreover, as integration of cells increased over time, the rate of racially motivated attacks in integrated cells decreased. After initially spiking from three assaults per 1,000 inmates to five per 1,000 inmates from 1991 to 1992, the rate of such assaults declined to less than one assault per 1,000 inmates by 1996, and remained at that level through the rest of the period covered by the study. *Id.* The bottom line for Trulson and Marquart is telling: "[V]ery few incidents were found to be racially motivated overall in the entire prison system, even less were among integrated cell partners, and finally, more desegregation did not equal increases in the rate of racially motivated violence over the long term." *Id.*[7]

[7] Trulson and Marquart have suggested that this finding lends credence to "equal status contact theory." This theory hypothesizes that as persons from different racial groups have a high intensity of contact under circumstances in which they are of relatively equal status with each other, any racial prejudice and animosity that they may have harbored beforehand will diminish. *Id.* at 745-46. Trulson and Marquart believe that the equal status contact theory has particular relevance in the prison setting because sharing a prison cell is a paradigm example of intense, forced contact, and in prison, all inmates share the misfortune of incarceration and thus have relatively equal status in that regard. *Id.*

The Texas study is the first of its kind. While additional scholarship on the impact of desegregation of prison systems presumably will be forthcoming, all told, the Texas study would seem to disprove the assumption behind the CDC's policy of racial segregation in double cells in reception centers – that integration of those cells inevitably will lead to greater interracial violence.

B. The CDC's Assumption That Racial Segregation Of Double Cells In Reception Centers Is Necessary To Prevent Interracial Violence In Prisons Is Inconsistent With A Recent Survey On The Experience And Professional Judgment Of Corrections Officials Nationwide.

The Trulson and Marquart study of the impact of desegregation in the Texas prison system is complemented by an important recent survey, conducted by another group of criminal justice scholars. This survey sought to determine whether, with increasing integration of cells over time, there has been a move away from longstanding assumptions held by many prison administrators that racial integration of cells would cause greater interracial violence. The authors of the survey published their results in a seminal article in an esteemed prison management publication. Martha L. Henderson, Francis T. Cullen, Leo Carrol, & William Feinberg, *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295 (2000).

As the article indicates, the authors disseminated their survey to wardens at maximum security facilities nationwide. The survey asked the wardens some general questions on the characteristics of their prisons and the

existence and/or nature of any formal or informal policies on integrating cells. The survey then turned to some very specific questions about integration. It asked the wardens "to determine whether the integration of prison cells would increase, decrease, or have no effect on the level of violence within an institution." The survey also "asked if racial conflict occurred within their facility as a direct result of integrated celling and to what extent they have had such problems." And the survey asked the wardens "to report, regardless of the policy within their institution, what the most desirable racial policy from the standpoint of safety and security would be." *Id.* at 303.

Ultimately, the authors received 141 useable responses to their survey. *Id.* at 300. Out of those responses, only 30% of the wardens expressed the view that racial integration of cells was likely to increase the level of violence. A whopping 70% expressed the contrary view, stating that racial integration of cells would have no effect or would likely decrease the level of violence. *Id.* at 304. To the question whether there was more violence in integrated cells than in non-integrated cells, only 11.6% of the wardens answered yes. *Id.* And to the question on what housing policy they thought would be most desirable from the standpoint of safety and security, only 1.5% recommended some form of forced racial segregation; 14% percent recommended permitting voluntary segregation; 24.4% recommended assigning inmates on a race-neutral basis without actively promoting racial balance; and the vast majority – 60.3% – recommended robust efforts to integrate. *Id.*

The authors summarized the results of their survey as follows:

> Since the integration of prison cells became an issue in the 1960s, wardens have typically argued that integration would lead to a loss of institutional control. . . . On the contrary, our data suggest that a shift in attitudes has taken place among current wardens. **These wardens state that, in their professional judgment, the racial integration of individual cells would have no effect one way or the other on the level of violence in an institution.** The majority of these wardens also go so far as to assert that there have been no instances of specific racial conflict among inmates occupying integrated cells within their institution. They tend to also agree that conflict is about the same between integrated cells and cells containing inmates of the same race in maximum security facilities.

Id. at 307 (emphasis added).[8]

To be sure, the evidence of the views of corrections officials on the connection between racial integration of cells and interracial violence is not yet fully developed. Based on the wardens' survey, however, it appears that the assumption behind the CDC's policy of racial segregation

[8] The authors of the wardens' survey are not alone in tracing an evolution in correction officials' views on the relationship between racially integrated cells and interracial violence. A few years ago, state and federal corrections officials held a high-profile meeting to examine the causes of, and possible solutions to, prison-bred racial animosity. According to the report of a senior Justice Department official who participated in the meeting, the wide majority of corrections officers who were present expressed the view that racial integration in prisons would not only "improve prison order and safety but also reduce the chance for increased hate attitudes and behaviors." Larry Meachum, *Prisons: Breeding Grounds For Hate?* Corrections Today 132 (December 2000).

of double cells in reception centers is radically out of step with the experience and views of senior corrections officials elsewhere.[9]

The *amici* wholeheartedly share those views. Based on their extensive experience in the corrections field, *amici* firmly believe that there is no connection between racial integration of cells and heightened levels of interracial violence. If anything, in the *amici's* estimation, racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence. Accordingly, in the professional judgment of the *amici*, a blanket policy of racial segregation of inmates is contrary to sound prison management.

Amici recognize that complete race-neutrality in cell assignments in reception centers may not be practical where there is a particularized racial problem at a corrections facility, and that therefore race may have to be taken into account in some instances to preserve order. However, we are aware of no state other than California that assumes that every incoming prisoner is incapable of getting

[9] Although beyond the scope of this *amicus* brief, we note that because the empirical evidence shows that racial integration of cells tends to dispel, not breed, racial prejudice and animosity, integration also serves the larger institutional goal of rehabilitation of prisoners, *see Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 14 (1979), by better equipping inmates to live peacefully in the racially diverse world to which they return upon release from prison. As one scholar has succinctly put it: "The vast majority of prisoners are released back into society and the manner in which inmates are treated in prison influences their post-prison experience. Corrections officials must take the lead in breaking the vicious cycle of hatred and intolerance. . . . If rehabilitation is a meaningful component of the prison experience, then teaching tolerance and racial equality is an important activity." Craig Hemmens, *No Shades of Grey: The Legal Implications of Voluntary Racial Segregation in Prison*, 4 Corrections Management Quarterly 26-27 (2000).

along with a cell mate of a different race. And we are aware of no state other than California that has acted on such an assumption by adopting an inflexible and absolute policy of racial segregation of double cells in reception centers.[10]

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[10] The Oklahoma Department of Corrections policy on inmate housing assignments in reception centers provides a stark contrast to the CDC policy. Oklahoma was under a court order to desegregate its prisons. *See Battle v. Anderson*, 788 F.2d 1421, 1425 (10th Cir. 1986). The state's policy on inmate housing in reception centers is in keeping with that desegregation mandate. The policy provides that while "newly received inmates are not generally assigned randomly to racially integrated cells[,] these inmates are not precluded from integrated cell assignments." *See* http://www.doc.state.ok.us/Offtech/op030102.htm. Corrections officials in Oklahoma make cell assignments in reception centers based on many factors, including information indicating that the inmate is affiliated with a gang; however, even gang affiliation does not preclude an integrated housing assignment. *Id.* To the extent that race is considered in the assignment calculus in Oklahoma, it appears to be one factor among many, and as a result, individualized consideration is given to all inmates. Such use of racial criteria bears the hallmarks of flexibility that the Court has said are essential for a racial classification to withstand scrutiny. *See Grutter*, 539 U.S. at 337.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals and remand.

Respectfully submitted,

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IN THE
Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BLACK LAW ENFORCEMENT OFFICERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Interest of *Amicus Curiae*[*]

The National Association of Black Law Enforcement Officers, Inc. ("NABLEO") is comprised of more than 1,500 individual members in 40 chapters, including many who serve as corrections officers in our Nation's prisons and jails. NABLEO members know first hand the serious problems of racial discrimination that continue to plague the administration of criminal justice, and it is a central aim of our organization to build a system that more fully lives up to constitutional ideals of fairness and equality. NABLEO and its chapters have played a leading role in reforming police practices that breed distrust of law enforcement in minority communities. NABLEO members are also acquainted with the harsh realities of prison life and the salient role that race and race-based violence play in many institutions.

Our experience as law enforcement professionals strongly confirms what recent decisions of this Court and others have recognized: that accomplishment of important objectives – including basic public safety responsibilities – will sometimes require the adoption of policies that take race into account. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306 (2003); *Petit v. Chicago*, 352 F.3d 1111 (7th Cir. 2003) (acknowledging "compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago").

In agreement with those decisions, we do not believe that sustaining such necessary policies is in any way incompatible with vigilance in rooting out invidious discrimination. There is, we believe, a fundamental difference between such policies and those predicated on racial bias and stereotypical thinking – one which federal Equal Protection review can – and must – take account of.

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[*]No counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution for its preparation or submission. Both parties have consented to its filing. Sup. Ct. R. 37.3, 37.6.

Summary of Argument

California prison officials, under a constitutional obligation to protect inmates from the predations of racially motivated prison gangs – and mindful of the special difficulty of protecting inmates within their cells – have adopted a two-stage process for assigning inmates to double cells. Permanent assignments are made on an individualized (non-racial) basis, with substantial weight given to the preferences of individual inmates. There is thus no bar to inmates of different racial and ethnic backgrounds sharing a cell on a permanent basis.

During the time that the initial evaluation is being conducted, however, Defendants take a different approach. In addition to separating inmates based on incompatibility that is known or immediately evident (*e.g.*, age, physical size, prior testimony, or known gang membership), Defendants assign inmates to reception center cells based on characteristics, both racial and non-racial, that correlate with prison gang fault-lines. Thus, there is a "[p]retty close to zero percent" chance, *see* 321 F.3d at 794, that a white and African-American inmate will be placed in the same cell during the intake process – or that Mexican-American inmates from Northern and Southern California will be. *See* 321 F.3d at 800 n.9 (describing violent hostility between "Northern" and "Southern" Mexican-American prison gangs). It is undisputed that the common areas, where surveillance and protection (while still difficult) are more practicable than inside cells, are racially integrated. Nor is it alleged that Petitioner was treated unfairly on account of race during the assessment process – or that the housing policy in any way singles out any racial or ethnic group for more (or less) favorable treatment.

We believe that the court of appeals was correct to reject Petitioner's claim that consideration of race during the evaluation phase of the assignment process was a denial of Equal Protection. But we do not agree that the standard of review is "paramount" or that, as the court appeared to assume

– and Petitioner argues – sustaining Defendants' policy entails turning away from *Lee v. Washington*. As we show, recognizing that *Washington* was rightly decided – or treating it as having applied the full range of strict scrutiny principles articulated in subsequent decisions – would not condemn California's policy.

In addition to emphasizing the importance of context, the Court's recent Equal Protection cases instruct that the ultimate object of heightened scrutiny is to differentiate government policies, such as the one condemned in *Washington*, which are predicated on illegitimate racial considerations, from practices – such as the ones here at issue – which consider race only in order to accomplish compelling – and genuinely non-invidious – public aims.

The undisputed facts about the operation of Defendants' practices establish that both aspects of the strict scrutiny test are satisfied, *i.e.*, that the objective pursued is "important enough" to warrant use of racial classification *and* that there is "little or no possibility" that any invidious motive or stereotypical assumption is at work. *Grutter*, 539 U.S. at 339 (quoting *City of Richmond v. J.A. Croson Co.*,488 U.S. 469 (1989)). Defendants' avowed objective – protecting individuals (of all races) against cellmate violence, during the limited time needed to make an informed, individualized assessment of their dangerousness and vulnerability – is plainly a compelling one.

Equally important, it is manifest that this objective – and no constitutionally illegitimate consideration – actually and fully accounts for Defendants' actions. Not only do numerous aspects of the policy attest to a special concern with preventing violence – and gang-motivated violence, especially – within cells, but the fact that Defendants make *permanent* assignments on an individualized basis – and readily authorize assignment of inmates of different races to the same double cells – answers any concern that reception center housing policy is animated by stereotypical assumptions about racial inferiority or race-based differences – or even a generalized belief that inmates of

different races cannot be housed together. Indeed, Petitioner's Equal Protection claim derives almost all its plausibility from a highly questionable premise: that Defendants maintain two distinct policies – a temporary one, which "segregates" inmates at reception centers, and a "second," policy, which fully complies with their Equal Protection duty, by permanently assigning those same individuals to cells on a non-racial basis, based on information developed during the evaluation stage.

Finally, to the extent that Petitioner asserts that the policy should be adjudged unconstitutional – in the *absence* of any illegitimate racial considerations – based on its supposed "overinclusiveness," *e.g*, because of its application to transferee inmates, as well as those entirely new to the California system, or because safety objectives might be achievable by a reception center housing policy that gave less "weight" to the race "factor," such a ruling would be neither constitutionally warranted nor appropriate.

These objections are doubtful on their merits, and they do not sound in Equal Protection. Even outside the prison setting, this Court's precedents would not require a court (or entitle a § 1983 plaintiff) to demand a detailed demonstration of a policy's superior efficacy, *after* the defendant established that no plausible Equal Protection danger was lurking, and it requires no surrender of the principles of *Lee* or *Grutter* to see why such an inquiry would be especially ill-advised here. Not only do the questions raised implicate the core expertise of the Defendant officials, but they arise in a context in which the Equal Protection duty of individualized consideration is not the only (or even the most important) constitutional duty operating.

ARGUMENT

A. Upholding The Policy Does Not Require Departure From *Washington*

The Court of Appeals treated the "standard of review [a]s paramount," 321 F.3d at 798, implying that Defendants' policy

could be upheld only by rejecting *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*), and imposing a "'heavy burden'" on inmate racial discrimination claims of every sort. 321 F.3d at 799 (quoting *Shaw v. Murphy*, 532 U.S. 223, 229 (2001)). Petitioner and *Amici* in turn describe the decision as announcing a rule that "racial segregation" within prison walls is entitled to an essentially irrebuttable presumption of constitutionality, Pet.Br.10, one which threatens to render the Equal Protection Clause "'a nullity in precisely the context where it is most necessary,'" *id.* at 29 (quoting *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979)).

We believe that these arguments – and the panel decision below – drastically overstate the extent of "diverge[nce]" between the available standards of judicial review, 321 F.3d at 799. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (cautioning against attaching undue importance to "[t]he formal label under which an equal protection claim is reviewed"). The "level of scrutiny" was not likely "outcome-determinative" in *Washington* – nor, as we show, would it be in this case: considering the policy under strict scrutiny standards would not call the judgment into question. *Cf.* 336 F.3d at 1121 (Ferguson J., dissenting from denial of *en banc* rehearing) (recognizing that it is "possible, even likely, that prison officials could show that the current policy meets the [strict scrutiny] test").[1]

As the Court of Appeals acknowledged, it is doubtful that the statutes and practices under consideration in *Washington*

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[1]Because the judgment on appeal granted individual Defendants qualified immunity from § 1983 damages liability, affirmance is required even if the Court concluded that a different standard is applicable, unless it were further determined that the decision is compelled by clearly established law. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001); *cf. Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 60 (2d Cir. 2003) (*Saucier* does not entirely foreclose appellate court's affirming judgment on immunity grounds).

could survive meaningful judicial scrutiny under any formulation. *See* 321 F.3d at 798; *Cleburne*, 473 U.S. at 452 (1985) (Stevens, J.) (noting many governmental actions for which courts do not need "a special standard, or to apply 'strict scrutiny,' or even 'heightened scrutiny,'" to invalidate); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971) (invalidating gender classification on rational basis review); *see also Morrison v. Garraghty*, 239 F.3d 648, 652, 655 (4th Cir. 2001) (applying *Turner* and finding Equal Protection violation); *compare also* ACLU Br.24 (arguing that *Turner* standard would validate race-based lockdown) *with Escalera v. Terhune*, 2004 WL 238763 (Cal. App. Feb. 10, 2004) (unpublished) (invalidating that policy under *Turner*).[2]

[2]Although we share concern that review be sufficiently rigorous, the United States overstates matters in suggesting that the decision below would result in all prison classifications' being subject to the same – "rational basis" – review. U.S.Br.18. At outset, when a government policy relies on classifications that trigger heightened review, courts focus on actual, rather than "conceivable" justifications for the policy. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Nor do the arguments of Petitioner and *Amici* offer escape from doctrinal difficulty. If they were accepted, prison policies that treated inmates differently based on *religion* would warrant drastically lower "rational basis" review, *but see Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits"), and federal courts would either have to entertain claims of gender discrimination from every inmate incarcerated in a single-sex institution or relegate the right to free from discrimination on that ground to the rational basis category. *See J.E.B. v. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment) (noting "strong presumption that gender classifications are invalid").

That the "Court has acknowledged that there is a *continuum* of constitutional rights, some of which are more compatible with the exigencies of imprisonment than others," ACLU Br.16 (emphasis supplied), does not argue for a discontinuous, "all or nothing" approach to judicial review – let alone for making such decisions at a high level of generality, based on the Amendment the prisoner invokes, rather than the concrete nature of the claim

Plaintiffs in *Washington* challenged a series of laws adopted by the State of Alabama mandating that inmates throughout the State be permanently and strictly segregated according to race. *See* 45 ALA. CODE §§ 4, 52, 121, 122, 123, 172 &183 (1958). Both the context from which the statutes arose and their operation betrayed their true purpose: "invidious racial discrimination." *Loving v. Virginia*, 388 U.S. 1, 11(1967). As a matter of law and logic, the statutes could not be understood in isolation from the State's many other "measures designed to maintain White Supremacy," *id.* & n.11, *i.e*, laws that forbade racial integration, "on the ground that colored citizens are so inferior and degraded that they cannot be allowed to [public

asserted and specific interests advanced by the parties. *Compare Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (holding that *Turner* standard did not affect review of Equal Protection claim involv[ing] "general budgetary and policy choices," but implying that more deference would apply if security interests were implicated); *Pargo v. Elliott*, 69 F.3d 280 (8th Cir. 1995) (*per curiam*) (determining first that there was no invidious gender discrimination, then that there was "substantial similar[ity]" between opportunities afforded male and female inmates, and then that remaining "differences were rationally related to legitimate penological interests").

Thus, while Judge Ferguson asserted that the Equal Protection Clause, like the bar on Cruel and Unusual Punishments, is "complementary" to prisons' mission, 336 F.3d at 1122. he did so the course of a decision that recognized that the challenged government actions could be constitutional, on a stronger evidentiary "showing" by Defendants. And although claims under the Cruel Punishments Clause may be unqualified by *"Turner,"* they are not adjudicated under an unvarying unitary standard. *Compare Wilson v. Seiter*, 501 U.S. 294 (1991), *with Whitley v. Albers*, 475 U.S. 312 (1986); *cf. County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (requisite level of fault for Due Process liability dependent on circumstances). The other suggested Amendment-based distinctions do no better: although the Equal Protection right is surely important, *all* prisoners' constitutional claims against States, assert rights that, *by definition*, are "fundamental," Pet.Br.29, *see Benton v. Maryland*, 395 U.S. 784, 794 (1969), and the distinction between rights "enjoyed" and "exercised," not only does a poor job of explaining the Court's cases, *see Washington v. Harper*, 494 U.S. 210 (1990), but would surely result in sustaining some of the least justifiable infringements while striking down some of the most reasonable ones.

facilities with] * * * white citizens." *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).[3]

Unsurprisingly, the Alabama regime drew no distinction between violent and non-violent offenders. It sought to maximize the extent of racial separation, and, of course, would have operated as an absolute bar to a (hypothetical) request by a African-American and a white inmate to be housed together – even though such freely-chosen arrangements could be expected to minimize the risk of in-cell violence.

And as was almost invariably the case wherever these invidious motives and assumptions were at work, the regime did not evince the slightest interest in providing equal – albeit "separate," treatment. *See, e.g., Gates v. Collier*, 501 F.2d 1291, 1299 (5th Cir. 1974) ("The practice at Parchman has been and is to maintain a system of prison facilities segregated by race through which black inmates are subjected to disparate and unequal treatment"). On the contrary, in Alabama (and elsewhere), the treatment of segregated African-American prisoners not only was vastly worse than that accorded whites, but was starkly redolent of the conditions of Antebellum slavery. *See, e.g., Harper v. Wall*, 85 F. Supp. 783, 785-87 (D. N.J. 1949) (granting relief to African-American prisoner who escaped from Alabama prison); *Sweeney v. Woodall*, 344 U.S. 86, 92-93 (1952) (Douglas, J., dissenting) (noting African-American petitioner's allegations that he had "been beaten by guards to the point of death [on Alabama chain gang] and will, if returned, be subjected to the same treatment"); *see also* D.

[3]Thus, in a number of jurisdictions, prison and jail policies were challenged – and overturned – in cases broadly attacking segregation in public facilities. *See, e.g., Coleman v. Aycock*, 304 F. Supp. 132 (N.D. Miss. 1969) (requiring desegregation of county jail, in lawsuit "encompass[ing] practically all public facilities operated by the county and city"); *Wood v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962); *cf. Palmer v. Thompson*, 391 F.2d 324 (5th Cir. 1967) (non-inmates lacked standing to challenge jail segregation in omnibus public facilities desegregation suit), *aff'd on other grounds*, 403 U.S. 217 (1971).

OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997); M. Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2027 (1999) (describing "prison systems of the former Confederate states * * *[that] were run for many years on a 'plantation' model [and] * * * were direct heirs to the slave plantation and the near-slavery systems of labor peonage and convict-leasing that succeeded the end of Reconstruction in the South").

Unsurprisingly, neither this Court's opinion in *Washington* nor that of the three-judge district court addressed or applied a particular standard of review. *Cf.* U.S.Br.4 (asserting that appeals court decision "refused to apply *Lee*'s presumption of unconstitutionality to the racial classification at issue in this case,"); Pet.Br.28 ("*Lee* was decided under the rule of strict scrutiny applied in *Brown* and its progeny").[4] This Court's one-paragraph *per curiam* opinion simply declared "without merit," 390 U.S. at 333, Alabama's arguments that its statutes were not-unconstitutional, and rejected as a misreading of the district court's decree the State's claim that it had made "no allowance for the necessities of prison security and discipline," *id.* at 334.

For its part, the district court opinion had rebuffed what it described as Alabama's "only defense" (essentially a rule of nonjusticiability): "that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Al. 1966).

[4]Commentators have observed that neither *Brown* nor numerous civil rights cases decided in the ensuing decade articulated or explicitly applied "strict scrutiny." *See* M. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991) (describing *McLaughlin v. Florida*, 379 U.S. 184 (1964), as the first case in which the Court "both articulated and applied a more rigorous review standard to racial classifications" and noting that approach was discarded, temporarily, the next Term in *Swain v. Alabama*, 380 U.S. 202 (1965)).

The opinion identified the regime's sweep and permanence as fatal defects, explaining that the court could "conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face *require complete and permanent segregation of the races* in all the Alabama penal facilities," *id.* at 331 (emphasis added). While so ruling, the decision "recognize[d] that there is merit in the contention that *in some isolated instances*[fn] *prison security and discipline necessitates segregation of the races for a limited period*," 263 F. Supp. at 331 (emphasis added),[5] but explained that "recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily,"*id.* *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating law under rational basis standard, because, *inter alia*, its "sheer breadth [was] discontinuous with the reasons offered for it").

Indeed, notwithstanding the undeniable invidiousness of Alabama's practices and the unequal treatment to which the State's African-American inmates were subjected, the three-judge court declined to order *immediate* desegregation of the State's maximum security prisons, instead stating an "expectation" that this would be accomplished within one year. Writing for the court, Judge Johnson explained:

> The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel * * * deserves the most careful consideration of this Court. In this connection, it is recognized that "the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human

[5]The court's footnote identified "the 'tank' used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober," *id.* at 332 n.6 as one "isolated instance[]" where segregation could continue.

> beings." * * *

263 F. Supp. at 332 (quoting *Edwards v. Sard*, 250 F. Supp. 977 (D. D.C. 1966)).

B. Strict Scrutiny Would Not Invalidate The Policy

To the extent *Washington* is read – somewhat anachronistically – as having relied on the various "strict scrutiny" principles associated with this Court's later Equal Protection decisions, its application does not support invalidating the policy.

This Court has recently affirmed that because "[n]ot every decision influenced by race is equally objectionable," *Grutter*, 539 U.S. at 327, strict scrutiny is not a rule of *per se* invalidity, but rather a means for "distinguishing legitimate from illegitimate uses of race in governmental decisionmaking," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) – "a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [the] particular context." *Grutter*, 539 U.S. at 327; *see also id.* ("[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause").

Notwithstanding Petitioner's demand for a different, more through evidentiary showing, *see* Pet.Br.33 (faulting Defendants' "unquantitative" evidence), the record in this case supplies a sufficient basis on which the two constitutionally dispositive determinations can be made: (1) that Defendants are "pursuing a goal important enough to warrant use "of a highly suspect tool" and (2) "that there is little or no possibility that the motive for the classification [in this case] was illegitimate racial prejudice[,] stereotype," or any other objectionable considerations. *Croson*, 488 U.S. at 493. Indeed, contrary arguments rely on isolating Defendants' reception center housing policy from the context in which it operates: a broader assignment policy that comports fully with what *Petitioner*

identifies as the central mandate of Equal Protection: to treat inmates as individuals, rather than as members of racial groups.

1. Defendants Have A Compelling Interest In Protecting Inmates From Race-Based Violence During The Evaluation Process

This is not a case where the importance of the governmental objective is open to serious debate. *Compare, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J.) (questioning "role model" justification). As this Court has recognized, Defendants have both a compelling interest and a constitutional duty to protect individuals in their custody from violence at the hands of fellow inmates. *See Farmer v. Brennan*, 511 U.S. 825 (1994).

> Having incarcerated persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.

Id. at 833 (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.1988)) (quotation marks removed).

Nor is this a case where the defense of the governmental policy depends on amorphous "problems of prison administration," or potential "ripple effect[s]." *Turner*, 482 U.S. at 90. The dangers against which the policy is directed are grave and real. Although it is a commonplace that "prisons are dangerous places," *see, e.g. Falls v. Nesbitt*, 966 F.2d 375, 380 (8th Cir. 1992), such truisms cannot convey the staggering level of serious violence that pervades many institutions. Thus, statistical measurements are notoriously difficult, it has been estimated that as many as 70% of inmates are physically assaulted by other inmates each year, ENCYCLOPEDIA OF AMERICAN PRISONS (M. MCSHANE & F. WILLIAMS, EDS., 1996) at 379, and Congress recently found that "[t]he total number of

inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000," Prison Rape Elimination Act of 2003, Pub. L 108-79 § 2(1), codified at 42 U.S.C. § 16501(1).

Violence between cellmates poses an especially serious problem. As Defendants witnesses explained, the kind of surveillance that is (theoretically) possible in common areas cannot be achieved within cells. *See* 321 F.3d at 794 (noting testimony that "[s]taff cannot see into the cells without going up to them, and inmates are capable of placing coverings over the windows so that staff cannot see in them at all"); *see also Jensen v. Clarke*, 94 F.3d 1191, 1198 (8th Cir. 1996) (sustaining findings that "tensions [inside institution's double cells] are increased by the cell size, lack of privacy, the ineffective surveillance system, deterrents to reporting, * * * and the excessive amount of time spent on lockdown status"); *Jones v. Bertnard*, 2003 WL 22301219 (10th Cir. 2003) (unpublished) (distinguishing "risk of harm * * * from a prisoner's cellmate, with whom he might be locked up in close quarters" from that "in the exercise yard [where] numerous other inmates [are] present"); *Tillery v. Owens*, 907 F.2d 418, 424-25 (3d Cir. 1990) (citing examples of violent attacks resulting from inappropriate cellmate assignments).

These dangers are especially acute at the reception stage, when facts bearing on any individual inmate's dangerousness and vulnerability are not yet known – indeed, the entire purpose of this temporary confinement stage is to assess the individual, with an eye toward a permanent assignment that is safe and appropriate.

The initial period is critical in other respects. Although the evaluation process might be expected to provide incentive to demonstrate good behavior, a strong countervailing force exists: new arrivals have an interest in promptly convincing other inmates of their readiness to use violent force. *See* J. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 92

n.9 (1987) (noting that "a reputation for violence" is "a deterrent against victimization"). At the same time,"new inmates are usually tested by predators to determine if they will resist exploitation," *id.*; *see also* 42 U.S.C. § 15601(4) (congressional finding that "Young first-time offenders are at increased risk of sexual victimization. * * * – often within the first 48 hours of incarceration"); *accord United States v Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting); *Tillery*, 907 F.2d at 424 (noting problems when "inmates are * * * double-celled before they are evaluated").

As decisions of this Court and others attest, prison violence is an area in which race very much "still matters," *Grutter*, 539 U.S. at 333. Not only is interracial violence widespread, *see* 42 U.S.C. § 15601(6) (noting "frequently interracial character of prison sexual assaults"), but it is frequently perpetrated by gangs organized largely (though not exclusively) on racial lines, *Harris v. Greer*, 750 F.2d 617, 619 (7th Cir.1984), and supported by an ideology of racial hatred. *See* ANTI-DEFAMATION LEAGUE, DANGEROUS CONVICTIONS: EXTREMIST RECRUITMENT IN AMERICA'S PRISONS (2002) at 5 ("gangs, long a part of prison life, tend to form along racial or ethnic lines and use racism to recruit and fuel their activities, often indoctrinating new members with violent bigoted rhetoric and a strong animosity toward other races"); *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir.1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry"); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001) (noting that "it is widely understood that members of different gangs or races would attempt to kill each other solely on the basis of gang membership or race"); U.S. DEP'T. OF JUSTICE, PRISON GANGS: THEIR EXTENT, NATURE AND IMPACT ON PRISONS (1985) 46 (finding that prison gangs accounted for 88% of all criminal incidents in California institutions); *David K.* v. *Lane*, 839 F.2d 1265, 1267 (7th Cir. 1988) (noting testimony that 75% to 99.5%

of facility's inmates were gang affiliated); *Walsh v. Mellas*, 837 F.2d 789, 796 (7th Cir.1988) (noting findings that "violence was rampant * * * and that gang influence pervaded the institution"); *Dawson v. Delaware*, 503 U.S. 159, 172 & n.1 (1992) (Thomas, J., dissenting) (collecting evidence of prison gang dangers).[6]

These gangs are dangerous because, as outside of prison, organized criminal activity poses a far greater danger than isolated antisocial behavior. *See United States v. Coonan*, 938 F.2d 1553 (2d Cir. 1991); *United States v. Barry Byron Mills* (N.D. Cal. Feb. 5, 2002) ("Mills Indictment") (criminal RICO and murder indictment of Aryan Brotherhood leadership); *id.* ¶¶11-12 (describing gang's structure); Y. Mastin, *Rico Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process*, 2001 WILLIAM MITCHELL L. REV. 2295, 2299 (quoting "constitution" of Mexican Mafia). Organized enterprises have additional motives for taking violent action and far more effective means of doing so – and of avoiding detection and punishment. Mills Indictment ¶6 (alleging that Aryan Brotherhood "uses murder and the threat of murder to maintain a position of power within the California and federal prison systems. Inmates and others who do not follow [gang's] orders * * * are subject to being murdered," as are "inmates who cooperate with authorities"); *id.* ¶8 ("members are required, when ordered, to kill without hesitation. They are also required to give false testimony in court on behalf of other members"); *United States. v. Shryock*, 342 F.3d 948, 969 (9th Cir. 2003) (describing operation of Mexican Mafia and

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[6]As the recent report of an international human rights group explains:

> In the prison context, * * * the racial tensions that pervade U.S. society are significantly magnified * * * [R]acial divisions are one of the dominant features of inmate life. Prisoners' social relationships are largely determined by race; their gang affiliation, if they have one, is racially defined; and whatever racist beliefs they may have held prior to their imprisonment are likely to be significantly strengthened over the course of their stay in prison.

HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001).

sustaining conviction of its California leaders).

And as this Court's non-prison cases have also recognized, there are strong reasons – in addition to abstract notions of blameworthiness, *see Barclay v. Florida*, 463 U.S. 963 (1983) – why racially-motivated violence triggers special concern. *See generally Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993); Violence animated by group hatred is, by definition, nearly impossible to explain (or prevent) with reference to facts particular to the individuals involved; it is often more brutal than violence carried out for other reasons; and almost always more likely to provoke (group-based) retaliation, *see, e.g.*, 321 F.3d at 801 n.9 (noting that three days after incident in which white supremacists attacked Northern Hispanic inmates, "a riot involving 39 inmates occurred when Northern Hispanics attacked white inmates"); Mills Indictment ¶¶ 249-308 (describing Aryan Brotherhood "Race War With Black Inmates,"including, ¶261, "order" directed to all white inmates in federal prison "that any black inmate who used violence against a white inmate was to be murdered"); *cf. Dawson*, 503 U.S. at 166 (acknowledging likely relevance of "membership in an organization that endorses the killing of any identifiable group" to "future dangerousness" inquiry).[7]

For these reasons, an institution's *failure* to take into

[7]Far from constituting an exception to these patterns, the California system is widely acknowledged to be at their epicenter. As court opinions attest, the best-organized and most-feared national gangs began inside California prisons, *see Dawson*, 503 U.S. at 162 (stipulation that "the Aryan Brotherhood [is] a white racist prison gang that began in the 1960's in California"); *Shryock*, 342 F.3d at 961 (noting Mexican Mafia's origins in California prison); PRISON GANGS at 91-116 (same for Black Guerilla Family and Nuestra Familia) and (despite aggressive efforts of prison and law enforcement agencies), these and newer gangs continue to play a central, pernicious role in the State's prisons. *See, e.g.*, Mills Indictment; *see also* J. DIIULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT 129 (1987) (describing prison gangs as "the chief operational fact of life inside California prisons").

account dangers of racial and gang violence can give rise to a claim of unconstitutional deliberate indifference. *See Robinson*, 249 F.3d at 866 (inmate alleged that defendants were "deliberately indifferent to the substantial risk that he would be seriously injured when he was placed in the prison yard with Mexican-American inmates"); *Walsh*, 837 F.2d at 799 (noting that, despite defendant officials' awareness of the "real and significant"risk of gang-related assaults, "they failed to institute procedures and safeguards in an attempt to determine whether an inmate to be housed with a gang member is targeted by that gang"); *Jansen*, 96 F.3d at 1200 (random assignment policy amounted to deliberate indifference).

2. The Record Establishes That No Improper Purposes Or Assumptions Are Operative

The evidence about the operation of Defendants' policy establishes that these important objectives actually – and fully – explain it. *See Grutter*, 539 U.S. at 328 ("reasons advanced by the governmental decisionmaker for the use of race in that particular context" must be "sincer[e,]" as well as "importan[t]"); *Virginia*, 518 U.S. at 533 ("justification must be genuine"); PLF Br.16 (careful judicial scrutiny ensures that government's explanations are not "'pretext[s] * * * for the accomplishment of objects not intrusted to the government'") (quoting *.M'Culloch v. Maryland*, 17 U.S. 316, 423 (1819)); *see also Wessmann v. Gittens*, 160 F.3d 790, 797-98, 802 (1st Cir.1998) (stressing that the necessity of a race-conscious policy is a "fact-sensitive inquiry" and that the "devil is in the details").

First, Defendants' cell assignment policies are narrowly and consistently focused on the danger of intra-cell violence. There is no effort to separate inmates in areas of reception centers in which behavior can be more readily monitored. *See* 321 F.3d at 797 & n.5 ("Inmates of all races work together, eat together, and use the yard together"). Indeed, the permanent policy – which generally gives effect to inmate choice – reflects the same concern: two inmates who seek to be housed with one another

are assumed to have determined that the chosen cellmate (whatever his racial background) poses a low threat of attack.

Moreover, the reception assignment policy gives comparable consideration to other, non-racial factors known to be correlated with gang membership and violence. *Compare Wessmann*, 160 F.3d at 798 (noting policy's narrow focus on *racial* diversity was incompatible with professed goal of "true diversity," *i.e.*, a "broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (stressing that "'underinclusiveness impairs the credibility of the government's rationale for speech restriction'") (quoting *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993); *cf. Croson*, 488 U.S. at 506 (noting "random inclusion" of Eskimo- and Aleut-owned businesses in MBE program and observing that the "gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation"). Mexican-American inmates from Southern and Northern California, known members of rival African-American gangs, and inmates whose size, criminal history, or known personal animosity raises the possibility of violent interaction are also kept apart. *See* 321 F.3d at 794; *see also Mooring v. San Francisco Sheriff's Dept.*, 289 F. Supp. 2d 1110, 1112 (N.D. Cal. 2003) (noting acknowledgment "that *Norteño* [Northern California] gang members should not be celled with *Soreno* [*sic*] gang members"). Thus, even if "the chances of an inmate being assigned a cell mate of another race [are] '[p]retty close' to zero percent,'" that does *not* establish that race was the "dominant factor" – only that it was one of a number of factors (some non-racial; some group-based; and some specific to particular inmate combinations) deemed relevant enough to keep inmates apart during the time that an individualized evaluation is being performed.

Evidence concerning the Policy's operation likewise establishes the extreme implausibility that any *im*permissible consideration is at work. *See* J. Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 439 (1997) (strict scrutiny "serves to test the government's claim that a permissible state interest *fully explains* the law at issue") (emphasis added); *Pitts v. Thornburgh*, 866 F.2d 1450, 1455 (D.C. Cir. 1989) (heightened scrutiny assures "that the [Equal Protection] dangers posed [by classification] are not dangers in fact"); 321 F.3d at 800 (concluding that under policy, race is considered "'solely on the basis of [its] potential implications for prison security'") (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989)); *see also Harris*, 750 F.2d at 619 (discussing hypothetical policy of separating inmates in prison "where gang activity [was] rampant" and explaining that "[r]acial separation brought about by policies founded exclusively on a bona fide, colorblind concern for the safety of prisoners in our nation's dangerous prisons does not violate the equal protection clause"). *cf. Califano v. Webster* 430 U.S. 313, 317 (1977) (*per curiam*) (sustaining classification after determining that it was not predicated on "archaic and overbroad generalizations about women," and that "the only discernible purpose of more favorable treatment was [a constitutionally] permissible one"); *Nguyen v. United States*, 533 U.S. 53, 73 (2001) (concluding that challenged "distinction * * * is not marked by misconception and prejudice, nor does it show disrespect for either class").

Significantly, the setting is not one where race can be said to be irrelevant. *Compare Grutter*, 539 U.S. at 326 (racial classifications are suspect because race has "long [been] recognized as in most circumstances irrelevant"). As explained above, "racial conflict, including extreme violence and riots, is the reality of institutional life in prisons [in California and] around the country." J. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT (1983) at 81; *see also Rojas v. Cambra*,

1997 WL 294409, *6 n.13 (N.D. Cal.1997) (noting that "[e]stablishing discriminatory intent in the way prison officials handle prison gang activity is no easy task because many prison gangs are organized along racial lines and therefore require that prison officials take race into account").

In fact, Petitioner and *Amici* do not seriously contend that race is irrelevant – or that Equal Protection requires a race-blind policy under these circumstances. On the contrary, Johnson stresses that "the question presented here is *not* whether race must be disregarded entirely," in reception cell assignments, Pet. Br.36 (emphasis added), "but whether it is constitutional for the state to effectively ignore or subordinate all other factors in favor of a single-minded consideration of race as the predominant factor," *id.* And his *Amicus* cites as an exemplar an Oklahoma policy that, while eschewing a complete bar on "integrated cell assignments" for arriving inmates, provides that "[f]or reasons of safety and security, newly received inmates are *not* generally assigned randomly to racially integrated cells. *This is because the specific information needed to assess and inmates criminal and victimization history [is] not available until after the initial classification processing has been completed.*" Br. Former State Corrections Officials 10 (emphasis added).

That a governmental policy arises in a setting where race cannot practically or responsibly be ignored is a factor which must necessarily inform Equal Protection scrutiny. *See Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998) ("Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause"); *see also Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999) (police manhunt based on victim's racial identification of perpetrator did not trigger strict scrutiny); *Comfort ex rel. Neumyer v. Lynn School Comm*, 283 F. Supp. 2d 328, 376 (D. Mass. 2003) ("When a government's ends are fundamentally

concerned with race – and those ends are recognized as compelling – it is natural that race-conscious means provide the 'snuggest fit' to those ends"); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000); *cf. Craig v. Boren*, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting) (classification should not be treated "as a talisman which – without regard to the rights involved or the persons affected – calls into effect a heavier burden of judicial review").

Moreover, there is no allegation that under the policy the inmates are treated differently on account of race. *Compare McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir. 1972) (*per curiam*) (noting that "living quarters at [whites-only] [c]ell [h]ouse are better than" integrated part of prison); *Stockwell* v. *Phelps*, 20 F.3d 187, 190 (5th Cir. 1994) ("white prisoners in two-man cells received preferential treatment over the cells occupied by black prisoners"); *Gates*, 501 F.2d at 1299 (finding "disparate and unequal treatment"); *cf. Pargo*, 69 F.3d at 281 (rejecting female inmates' Equal Protection claim, based on absence of "invidious discrimination" and findings of "substantial similari[ty]" of "programs and services available to women and men inmates as a whole").[8]

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[8]The allegations in *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) illustrate facts, if sustained, would seem inexplicable on any ground other than invidious discrimination:

> [W]hen Black was hired as a laundryman's helper in the protective custody unit, he was assigned to assist the head laundryman who was white. As head laundryman, the white inmate was allowed outside of his cell for thirteen hours a day, seven days a week. Black, who was only the helper, was confined to his cell after 2:00 p.m. on weekdays and throughout the weekend. After the head laundryman resigned * * *, Black became the head laundryman and was given a white helper. Black might have thought that he had been promoted until he learned that the privileges associated with the two positions had changed. The head laundryman's helper was permitted outside his cell for thirteen hours a day and during weekends. The new head laundryman, Black, was still confined to his cell after 2:00 p.m. and on weekends.

Petitioner and *Amici* are obviously correct that facial even-handedness is not constitutionally dispositive, *see McLaughlin*, 379 U.S. at 191 ("Judicial inquiry under the Equal Protection Clause * * * does not end with a showing of equal application among the members of the class defined by the legislation"); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

But it does not follow that the absence of disparate treatment is constitutionally inconsequential. *See Grutter* 539 U.S. at 327 ("fundamental purpose" of strict scrutiny is to take 'relevant differences' into account") (quoting *Adarand*, 515 U.S. at 228). This Court's cases have consistently identified unequal, group-based disabilities as a central concern of Equal Protection. *See, e.g., Adarand*, 515 U.S. at 228 (careful scrutiny required "before permitting unequal treatment based on race to proceed"); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) ("legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish") (citation omitted); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting "narrower scope for operation of the presumption of constitutionality when legislation [is motivated by] * * * prejudice against discrete and insular minorities"); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect").[9]

Departures from even-handedness obviously indicate that

[9]As Justice Scalia recently emphasized,"the famous [*Carolene Products*] footnote" – "the genesis of heightened standards of judicial review," *Virginia* 518 U.S. at 576 (Scalia, J., dissenting) – indicated that "searching" scrutiny would be limited to legislation whose impact is felt by a "'discrete and insular minorit[y]'" that is unable to employ the "'political processes ordinarily to be relied upon,'" *id.* (quoting 304 U.S. at 153 n.4).

a governmental actor's professed non-racial objectives are disingenuous and that impermissible considerations are likely at work. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (Equal Protection does not permit law that is "impartial in appearance, yet * * * applied and administered * * * with an evil eye and an unequal hand"); 321 F.3d at 799 n.7 ("If * * *whites were treated more favorably in cell locations or privileges than blacks, the would likely be struck down under *Turner*").[10]

Nor should the *reason* the cited decisions gave for looking beyond facial even-handedness be disregarded: because such evidence alone did not negate the possibility that an especially pernicious purposes was at work. Thus, Justice Harlan's *Plessy* dissent observed that "[t]he thin disguise of 'equal' accommodations," *see* 163 U.S. at 562, "[could] not mislead any one," because "[e]very one knows that [Louisiana's segregation statute] had * * * the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons;" *accord Loving*, 388 U.S. at 11 (observing that the true purpose of anti-miscegenation laws was "to maintain White Supremacy"); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group"); *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) (discussing Ku Klux Klan terror and observing that "'a page of history is worth a volume of logic'") (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).[11]

[10]Notably, each one of the disturbing examples of racial discrimination and of the widespread "perception of continuing racial discrimination," presented in the *Amicus* Brief of the ACLU relates to *unequal* treatment on account of race. *See, e.g.*, ACLU Br.11 (summarizing extent of agreement that "blacks are treated more harshly than whites in the criminal justice system"). But this case does not involve such claims.

[11]Numerous recent decisions have highlighted the Equal Protection significance of the fact that a race-conscious policy is "non-preferential," with some treating that feature as bearing on the level of scrutiny to be applied,

Although Petitioner and *Amici* half-heartedly suggest that, like the laws in *Plessy* and *Brown*, Defendants' policy should be "interpreted as a badge of inferiority stamped upon *minority* prisoners" – rather than an expression of "bona fide, colorblind concern for the safety of [all] prisoners," *Harris*, 750 F.2d at 619 – the evidence about Defendants' actual practices cannot bear that understanding. First, where prison gangs and racial violence are concerned, there is no "victim" or aggressor race. As noted above and in the opinions of this Court, *Caucasian* prison gangs in California are as deeply entrenched, as violent, and as deeply committed to racial hatred, as those comprised of other ethnic groups, *see Dawson* 503 U.S. at 172 n.1 (Thomas, J., dissenting) (collecting sources documenting Aryan Brotherhood's "hostility to black inmates," and record of violence and extremism); Mills Indictment, *supra*, and Defendants' policy shows precisely the same concern for assigning Mexican-American inmates from Northern and Southern California to different cells – an action that betrays no ethnic stereotype, but which is entirely consistent with a concern for preventing gang-inspired violence. And Defendants make no effort to separate inmates outside of cells. *See* W. Rideau & B. Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1061, 1068 (1985) (white and black inmates "ate in the same dining hall, [but] a wooden partition ran down the center of the huge facility, separating their respective eating areas"); *Washington*, 261 F. Supp. at 331 (laws required "complete" segregation).

Most important, any assertion that the policy signals

Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir.1992); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir.1984), and others treating it as relevant to the *performance* of strict scrutiny analysis. *See Brewer*, 212 F.3d at 752; *Comfort*, 283 F. Supp. 2d at 363 (noting arguments for "intermediate scrutiny" of "policies that are race-conscious but do not * * * prefer members of one race over another," but holding that policy survived strict scrutiny); *see also Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky.2000).

"second class citizenship" or even that it reflects an even-handed belief that "persons of different races cannot safely be housed together," U.S.Br.25, cannot be reconciled with Defendants' *permanent* assignment policies, which interpose no barrier to inmates of differing races sharing a cell and promote integration in dormitories.[12]

It should go without saying that both content of these policies and the objectives they advance – allowing African-American and white inmates to live together permanently by choice and affirmatively seeking integration in dormitories – would have been anathema to the officials in *Brown*, *Plessy*, and *Washington* to whom Petitioner and *Amici* casually analogize Defendants. *See also Black*, 538 U.S. at 393-94 & n.2 (Thomas, J., dissenting) ("It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message * * * *It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct [intimidating cross-burning] it must have viewed as particularly vicious"); *cf. Comfort*, 283 F. Supp. 2d at 378 ("Even if it were reasonable to conclude (and I find it highly doubtful) that students in Lynn come away from school registration with the mistaken belief that the district means to remind them of racial difference, everything about the Lynn experience is directed at clarifying and correcting this misapprehension").

The rejoinder, that "[t]he evils of state racial segregation do not dissipate merely because it is doled out only in successive

[12]Nor can Defendants fairly be accused of using inmates' race as a "proxy" for their proclivity to racial hatred or interracial violence, *see Powers*, 499 U.S. at 410. As the context in which it operates makes clear, Defendants reception housing policy is not reflective of an *assumption* that an individual inmate is racist or violent – but rather an indication that his proclivities, while being actively investigated, are not yet known.

60-day intervals, or because the inmate is not locked in a segregated cell for 24 hours a day," Pet.Br.40, misses the point. First, the distinction between "temporary" and permanent restrictions is not nearly as alien to constitutional law as this sound-bite argument supposes. *See Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Regional Planning Ag'y*, 535 U.S. 302 (2002) (temporary development moratorium not *per se* Taking); *City of Littleton v. Z.J. Gifts*, 124 S.Ct. 2219, (2004) (adult business licensing regime does not offend First Amendment, so long as bookstore owner may promptly seek judicial review of application denial); *cf. Zadvydas v. Davis* 533 U.S. 678, 692 (2001) – and *Washington* is not easily read as holding that the temporal dimension is *ir*relevant. See 263 F. Supp. at 331 (describing practice of "complete and permanent segregation" and recognizing instances where separation for a "limited period" might be warranted); *see also White v. Morris*, 832 F. Supp. 1129, 1134 (S.D. Ohio 1993) (temporary separation, after inmate records were destroyed, was consistent with consent decree because "the purpose of the * * * Decree was to ensure [prison's] *safe* integration") (emphasis in original).

But it is not the policy's limited duration in itself that is of pivotal constitutional relevance. Rather, it is the *function* that temporary reception center confinement undeniably serves: enabling Defendants to obtain accurate information on which inmates' permanent cell assignments can be determined. There is thus nothing mysterious, let alone constitutionally suspect, about "why cell assignments that are deemed safe on day 61 are presumptively unsafe on day 59 (or day 30, or day 10)," Pet. Br.37. The former are made after a process of individualized evaluation is complete, based on the information obtained. *Accord White*, 832 F. Supp. at 1133 ("Without the crucial information lost in those records, attempting integration could be dangerous to both staff and prisoners, and thus, random celling cannot proceed according to the consent decree"); Br. Former State Officials 10 n.10 (quoting policy that suspends

race-neutral assignments "until after the initial classification processing has been completed"); *cf. Tahoe-Sierra*, 535 U.S. at 340 (highlighting"interest in protecting the decisional process").

Indeed, what Petitioner and *Amici* identify as the central mandate of Equal Protection well describes the operation and evident object of Defendants' cell assignment practices: "'to ensure that each [inmate] is evaluated as an individual" – not in "a way that makes [his] race or ethnicity the defining feature of his [placement]." *Grutter*, 536 U.S. at 309.[13]

3. The Policy's Supposed "Overinclusiveness" Has No Bearing On The Equal Protection Question

To the extent that Petitioner urges that the policy be invalidated – notwithstanding the absence of any suspected invidious predicate – on "narrow tailoring" grounds, *i.e.*, based on the asserted insufficiency of evidence that Defendants' safety objectives would be frustrated by a policy that exempted transferee inmates or gave less "weight" to the race factor, the Equal Protection principles invoked do not support such a claim.

Most fundamentally, strict scrutiny cases do not establish "fit" between means and end as a free-stranding constitutional mandate, but rather describe that inquiry primarily as a tool for determining whether improper considerations were operative: "heightened scrutiny of a racial classification permits a court to conclude, in effect, 'If the state were really interested in race-neutral purpose x, it would not have done what it did,'" J. Rubenfeld, 107 YALE L.J. at 437. Once the list of possible Equal Protection "dangers" has been exhausted, the basis for demanding more or different evidence about a policy's comparative efficacy is at an end.

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[13]Nor is there any contradiction whatsoever, let alone a constitutionally fatal one, between Defendants' consideration of race at the reception stage and their practice of encouraging racial integration "to minimize * * * violence in prison dormitories." U.S.Br.9. Each is fully consistent with taking a protective approach until the individual characteristics bearing on an inmate's dangerousness and vulnerability are reliably known.

Nor, in any event, is it right that narrow tailoring would require Defendants to disprove the feasibility of a "more flexible" consideration of race, *i.e.*, one that makes race one of a number of "factors" considered in assigning inmates to reception cells. As a threshold matter, (and as explained above) Defendants' reception center housing policy *does* treat race as "one of several factors" – in the respect that is most constitutionally meaningful. *See* p. 18, *supra* (explaining that policy is not suspiciously underinclusive).

At least as important, the reasons that make such an inquiry constitutionally significant in other settings are simply not implicated here. *See Grutter*, 539 U.S. at 334 (narrow tailoring test must be "calibrated to fit the distinct issues raised by the use of race" in particular context). In higher admissions cases, multi-factored consideration serves to ease the impact on those disadvantaged by a racial"plus" factor and to vindicate applicants' entitlement to individualized consideration. *See Regents, Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (Powell, J.) (Harvard approach assured that disappointed nonminority applicant's qualifications were "weighed fairly and competitively," leaving him "no basis to complain of unequal treatment under the Fourteenth Amendment"). But the policy challenged here does not "burden" the members of any group, *see Bakke*, 438 U.S. at 301 n.39, and the "benefit" with which the policy is ultimately concerned – (permanent) prison housing – *is* allocated on an individualized, entirely non-racial basis.

The legal regime urged by Petitioner and *Amici* would be fundamentally unadministrable, as well as constitutionally superfluous. The same "principle" cited as requiring Defendants to adduce objective, empirical support for making race a full disqualifying factor in cell assignment decisions would also require judicial determination of claims that a different policy gave "too much weight" to the race variable – or that prison administrators were *in practice* giving greater weight than prescribed in a stated policy. Such elaborate evidentiary

showings might be appropriate in a case where the government actor's actual motives are in doubt (or when a class is excluded from participating in a governmental benefit), *see, e.g.*, *Croson*, but such minute, fact-intensive scrutiny would be extraordinary (and quite probably counter-productive) in a case of a prison policy developed for non-invidious reasons. *Cf. United States v. Fordice*, 505 U.S. 717, 762 (1992) (Scalia, J., concurring in judgment in part, dissenting in part).[14]

Nor, to the extent the issue was preserved below, is the policy's application to transferee inmates, and not just truly new arrivals, the Equal Protection "smoking gun" it is suggested to be. There is no indication what particular illegitimate or racial purpose Defendants' treatment of transferees actually reveals – and while it may be true that transferred inmates and brand new arrivals are not identically situated, in the sense that more information is known about the former, such concerns speak

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[14]The skepticism advocated by Petitioner's *Amici* is not readily cabined. Thus, the United States explains that the federal Bureau of Prisons *does* "consider race as one of many demographic factors, such as age, nationality, religion, and gang affiliation, to promote integrated and diverse institutions and housing units," U.S.Br.26, and that it "monitors the racial composition of its institutions and may consider race in overseeing the population of an institution as necessary to ensure that the institution does not become de facto segregated," *Id.*

Assuming that the stated interest in "diversity" and avoiding "de facto segregation" is security-based – *i.e.*, reflective of a (reasonable) judgment that housing inmates together can dampen racial tension – and not rooted in the First Amendment, *cf. David K.*, 839 F.2d at 1278 (Easterbrook, J., concurring) ("prison gangs [do not] meet every month to discuss * * * debate how Stanley Tigerman's buildings differ from those of the Bauhaus school"), the principles advanced in the *Amicus* Brief would require federal corrections officials to demonstrate these benefits at the institutional level *and* to show that the "amount" of consideration given race was not inordinate. As suggested above, similar showings could be required to sustain single-sex policies, which are far more likely than the policy here to rest (at least in part) on constitutionally troublesome thinking and entail far more serious claims of disparate treatment. *See* R. Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L. J. 1182 (1985).

more to the (relative) length of transferees' stay in the reception stage than to whether the policy should apply during that stage. In fact, some of the rationales underlying Defendants' policy are plainly applicable to transferees: because a reputation for "toughness" can be protective, *see supra*, transferred inmates have reasons to behave differently – more violently – on arrival at a new institution than they may have at the previous facility (and some transfers reflect a determination by the sending institution that the inmate's prior placement was inappropriate, *e.g.*, that he was more violent or trouble-prone than an initial evaluation had predicted). But accepting that transferees are, in fact, held for 60 days (a point on which there appears to be some uncertainty), a claim that transferees – of all races – are held for 60 days, rather than 14, if it sounds in Equal Protection at all, is a long way from the core concerns that animated *Washington*.

Finally, it would require no betrayal of strict scrutiny principles to see that this case is an extraordinary candidate for adopting the exceedingly demanding and rigid conception of "narrow tailoring" for which Petitioner argues. As *Grutter* teaches, even in – perhaps especially in – strict scrutiny analysis, "context matters," 539 U.S. at 334. *See also Pitts*, 866 F.2d at 1455 ("acknowledgment of the difficulties inherent in the prison context does not reduce or eviscerate heightened scrutiny, but it does recognize that those difficulties do not disappear once a party raises a discrimination claim"). And here, as in *Grutter*, the Equal Protection Clause is not the only constitutional provision requiring consideration. The policy implicates not only Defendants' professional expertise, but their constitutional duty to protect the lives and safety of those within their custody. *Cf. Wygant*, 476 U.S. at 291 (O'Connor, J., concurring).

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GARRISON S. JOHNSON

Petitioner,

v.

CALIFORNIA

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, DELAWARE, IDAHO, NEVADA, NEW HAMPSHIRE AND NORTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should this Court create an equal protection "exception" to the deferential standard adopted in *Turner* v. *Safley*, 482 U.S. 78 (1987) for assessing constitutional claims by prison inmates?

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INTERESTS OF *AMICI CURIAE*

Amici States strongly oppose the efforts by Petitioner and his *amici* to create piecemeal exceptions to the rule of *Turner* v. *Safley*, i.e., that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). That rule is based upon this Court's correct conclusion that judgments about prison security "are peculiarly within the province and professional expertise of corrections officials," *Pell* v. *Procunier,* 417 U.S. 817, 827 (1974), and that federal courts should give those officials wide deference "to deal with the increasingly urgent problems of prison administration and reform." *Turner,* 482 U.S. at 84.

Consistent with these principles, this Court has repeatedly instructed that *Turner* establishes "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Shaw* v. *Murphy,* 532 U.S. 223, 229 (2001). Thus, with the possible exception of claims under the Eighth Amendment, the *Turner* standard "applies to *all circumstances* in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper,* 494 U.S. 210, 224 (1990) (emphasis added). In light of these clear and consistent instructions, *amici* States have repeatedly relied upon the *Turner* reasonableness standard in formulating and implementing prison policy.

Petitioner and his *amici*, however, now seek to limit *Turner*. Today they seek an exception for claims arising under the Equal Protection Clause of the Fourteenth Amendment. But tomorrow they and their allies will undoubtedly seek other such exceptions which will, in the aggregate, swallow the *Turner* rule and ultimately destroy it.

Indeed, Petitioner has provided no limiting principle to his assertion that rights based on equal protection warrant strict security. He has merely cited this Court's precedents holding that racial classifications that occur *outside* prison are subject

to strict scrutiny. But *Turner* is premised on the unyielding fact that the administration of a prison, unlike other public institutions, is an "inordinately difficult undertaking." *Turner*, 482 U.S. at 85. To subject *any* prison-based constitutional challenges to strict scrutiny would make that undertaking nearly impossible.

Moreover, the same concerns that prompted this Court to adopt the *Turner* standard in the context of First Amendment and due process claims apply with equal force to prison-based equal protection challenges. Racially segregated gangs remain the reality in prisons throughout the country. And racially motivated violence, including rape and murder, is one of the most intractable problems of prison administration. It is no exaggeration to say that, in this context, the discretion given to prison administrators under the *Turner* standard could well be necessary to protect the health and, indeed, the lives of many prison inmates.

Amici States' opposition to piecemeal exceptions to the *Turner* standard is consistent with their steadfast conviction that invidious discrimination is inimical to a free society and should be eradicated. Thus, *amici* States continue to embrace the central teaching of *Washington* v. *Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968)—that a policy of "complete and permanent" segregation of prisoners violates the Equal Protection Clause. 263 F. Supp. at 331. Moreover, *amici* States neither support nor condone any kind of invidious discrimination in prisons or elsewhere. All that *amici* ask is that their prison officials be given discretion to consider race on a temporary basis when they reasonably conclude that considerations of prison safety justify it.

SUMMARY OF ARGUMENT

I. In *Turner* v. *Safley*, this Court resolved any doubt as to the standard of review that applies to the constitutional claims of prison inmates: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. In *Turner*, the Court did not distinguish among constitutional rights and gave no indication that equal protection claims were exempted from the reasonableness standard.

Moreover, the rationale underlying *Turner*—that the uniquely volatile nature of the prison environment makes deference to prison authorities necessary—clearly applies to all constitutional claims, including equal protection claims. And this Court's subsequent decisions have solidified *Turner*'s conclusion that *all* constitutional claims by prison inmates are subject to a reasonableness inquiry. *See, e.g.*, *Shaw* v. *Murphy*, 532 U.S. 223, 229 (2001); *Washington* v. *Harper*, 494 U.S. 210, 224 (1990). Accordingly, *Turner* and its progeny make clear that when a prisoner challenges a prison policy arguing that it violates his equal protection rights, the federal courts are to review the policy only to determine whether it is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

Contrary to Petitioner's position, *see* Pet'r Br. at 24-27, this Court has never held or suggested that prison-based racial equal protection claims are subject to strict scrutiny. Petitioner relies most heavily on *Lee* v. *Washington*, 390 U.S. 333 (1968) (per curiam), asserting that the *Lee* Court applied strict scrutiny. But *Lee* neither expressly nor implicitly applied strict scrutiny to prison-based equal protection claims. Instead, the Court held only that "complete and permanent" segregation of the entire Alabama prison system was unconstitutional. *Id.*

Petitioner and his *amici* also rely heavily on the fact that, outside the prison context, this Court has sometimes used the unqualified language of color-blindness in dealing with affirmative action claims. But nothing in these cases suggests this Court intended to overrule *sub silentio*, the Court's holding in *Turner* and its progeny that, in the uniquely volatile prison context, the "reasonable relationship" test applies to "*all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper*, 494 U.S. at 224 (emphasis added).

II. Creating an equal-protection "exception" to *Turner* would also be inappropriate as a matter of policy. Racially motivated violence remains one of the most intractable problems in American prisons. Indeed, even Petitioner and his *amici* cannot dispute that prisons in many states are dominated by prison gangs broken down along racial lines. Nor can they dispute that racial violence is a very real problem facing prison officials.

Accordingly, there can be no serious question that prison administrators need the discretion they are given under *Turner* to address directly the threat of racial violence. Given the severity of this problem, it is especially important that prison administrators not be confined by "inflexible strict scrutiny analysis," which "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89.

While the *Turner* standard is necessary to give prison administrators discretion to address the problem of racial violence, it would not give prison administrators unchecked authority to trample on the rights of prison inmates. *Turner* is sufficiently rigorous to ensure that prison administrators are not making racial classifications unrelated to legitimate penological objectives. Indeed, courts applying *Turner* have concluded that some prison policies are not, in fact, sufficiently related to a legitimate penological interest to

survive scrutiny. *See, e.g.*, *Morrison v. Garraghty*, 239 F.3d 649 (4th Cir. 2001). The *Turner* standard would thus not condone complete and permanent segregation of the races, *Lee*, 390 U.S. at 333-34, nor would it allow for the preferential treatment of any race, *Johnson* v. *California*, 321 F.3d 791, 799 n.7 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 1505 (2004).

In short, there simply is no reason, in law or policy, to start down the slippery slope of creating piecemeal "exceptions" to the *Turner* standard.

STATEMENT OF FACTS

Amici adopt the statement of facts in Respondent's brief.

ARGUMENT

I. UNDER THIS COURT'S PRECEDENTS, *TURNER*'S REASONABLENESS STANDARD APPLIES TO EQUAL PROTECTION CLAIMS AS WELL AS OTHER CONSTITUTIONAL CLAIMS.

This Court has clearly and consistently held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). With equal clarity and consistency, as shown below, this Court has rejected every effort and declined every opportunity to confine *Turner* to a subset of constitutional challenges, and has instead treated *Turner* as "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001).

Petitioner asks this Court to undo what *Turner* wrought, namely, a workable and constitutionally sound affirmation of the rights of prisoners against arbitrary or irrational governmental policies or practices. Under *Turner*, the rights of prison inmates, like the rights of free men, are absolutely

protected against arbitrary or irrational state action. But that affirmation of constitutional rights takes into account, as any standard of review must, the fact that rights always depend to some degree on the context within which they are exercised. *See, e.g.*, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends upon the circumstances in which it is done."). In *Turner*, the Court acknowledged that the prison context is a uniquely problematic one and calls for a unique circumscription of constitutional rights. As shown below, there is nothing in this Court's decisions, before or after *Turner*, remotely to suggest that prison-based racial equal protection claims are, or should be, subject to a different standard.

A. As This Court Has Repeatedly Emphasized, *Turner* Provides A Unitary Standard Of Review For All Prison-Based Constitutional Claims.

The *Turner* Court resolved any question as to what standard of review applies to the constitutional claims of prison inmates. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. With the possible exception of claims under the Eighth Amendment, this reasonableness measure is "a *unitary*, deferential standard for reviewing prisoners' constitutional claims." *Shaw* v. *Murphy*, 532 U.S. at 229 (emphasis added).[1]

1. In fact, *Turner* itself chose not to distinguish among constitutional rights by creating a hierarchy of standards of review. In *Turner*, the Court began its consideration of

[1] *See, e.g.*, *Overton* v. *Bazzetta*, 539 U.S. 126, 140 (2003) (Thomas, J., concurring in the judgment) ("The only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishment of the Eight Amendment, and *Turner* cited neither that Clause nor the Court's precedents interpreting it."). This exception to *Turner*, if it were to be recognized by the Court, could not possibly justify a different standard for claims based on other constitutional provisions.

prison-based constitutional claims by confirming that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. The Court observed that it was beyond dispute that prisoners retain the guaranties and protections of the First Amendment (noting, as an example, that prisoners have the right to petition the government for redress of grievances), the Due Process Clause (citing *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Haines* v. *Kerner*, 404 U.S. 519 (1972) (per curiam)), and the Equal Protection Clause, (prison inmates "are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment" (citing *Lee* v. *Washington*, 390 U.S. 333 (1968)). *Id.* at 84. Thus, the Court's task was to formulate a standard of review responsive to both the rights of prison inmates and the needs of prison officials, who must deal with increasingly complex and difficult administrative problems. *Id.* Both before and after *Turner*, reasonableness has been the key to the Court's settlement of this long-standing constitutional tension.

The Court responded to these competing concerns by formulating a unitary reasonableness standard. Though *Turner* involved challenges based on the First Amendment and the Due Process Clause, the Court, as its reference to *Lee* makes clear, anticipated race-based equal protection claims. The Court, nevertheless, concluded that a prison regulation is valid if reasonably related to a legitimate penological interest, regardless of the constitutional origin of the right with which it interferes. *Id.* at 89.

Moreover, the Court expressly refused to rule that the reasonableness standard applies only in cases in which the restrictions are directed to presumptively dangerous activities. Indeed, in its brief to the Court in *Turner*, the United States explained that such a distinction makes little sense:

> Convicted and imprisoned felons necessarily lose not only those rights that are obviously inconsistent with

> incarceration, but also those rights that are inconsistent with the safety of prison personnel and other prisoners, the protection of prison property, the administration of a large and complex facility, and the achievement of penological objectives, including deterrence and rehabilitation.

Brief of United States as *Amicus Curiae* Supporting Petitioners at 13-14, *Turner* v. *Safley*, 482 U.S. 78 (1987) (No. 85-1384). This Court agreed with the United States and concluded that a right's consistency with proper incarceration is merely a *factor* to be considered as part of the reasonableness inquiry. Specifically, this Court noted that the judgment that some rights warrant greater protection than others is really "a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns. It therefore provides a tenuous basis for creating a hierarchy of standards of review." *Turner*, 482 U.S. at 89.

2. Moreover, the rationale underlying *Turner*—that the uniquely volatile nature of the prison environment makes deference to prison authorities necessary—applies to equal protection claims as much as it applies to claims under the First Amendment.

The *Turner* standard was based on this Court's understanding that prison administrators face complex and difficult challenges in ensuring the security and safety of the prison environment. *Turner*, 482 U.S. at 84 (prison administrators need deference "to deal with the increasingly urgent problems of prison administration and reform"). As this Court has previously stated in *Procunier* v. *Martinez*, 416 U.S. 396 (1974), "[p]rison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication." *Id.* at 404. And

moreover, as this Court later explained, "prison administrators are . . . under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

In its analysis of precedent, moreover, *Turner* rejected the idea that equal protection claims warrant a stricter standard of scrutiny than other constitutional claims. One of the decisions the Court relied upon was *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *see Turner*, 482 U.S. at 86-88. There, the Court addressed an equal protection claim by inmates who sought to form a labor union. The district court had struck down prison regulations prohibiting correspondence and meeting rights related to union activity on the ground that "this was a denial of equal protection because bulk mailing and meeting rights had been extended to the Jaycees, Alcoholics Anonymous, and the Boy Scouts." 433 U.S. at 133. But this Court disagreed. It determined that prison administrators should be given "the full latitude of discretion, unless it can be firmly stated that . . . discretion has been abused." *Id.* at 136.

As it would later do in *Turner*, the *Jones* Court rejected a more rigorous standard of review as "inconsistent with the deference federal courts should pay to the informed discretion of prison officials." *Id.* Where prison security is at issue, the Court was not prepared to offer equal protection claims stricter scrutiny than other constitutional claims. "There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." *Id.*

In short, the rationale underlying *Turner* is the difficulty of maintaining order within the prison context. That concern is not of lesser moment because a petitioner brings an equal protection claim rather than challenging a prison regulation under the First Amendment or Due Process Clause. This Court, accordingly, has consistently refused to confine the

Turner reasonableness standard to any subset of constitutional claims.

3. This Court's subsequent decisions have solidified *Turner*'s conclusion that all constitutional claims by prison inmates are subject to a reasonableness inquiry. In *O'Lone* v. *Estate of Shabazz*, 482 U.S. 343 (1987), decided the same term as *Turner*, this Court held that the application of the *Turner* test did not turn on the question of whether the right allegedly violated is inconsistent with prison safety. The Court rejected, as it had in *Turner*, the argument that "more rigorous scrutiny is appropriate unless a court can conclude that the activity for which prisoners seek protection is 'presumptively dangerous.'" *Id.* at 349 n.2 (citing *Turner*, 482 U.S. at 89).[2]

Similarly, in *Washington* v. *Harper*, the Court reiterated that the *Turner* standard applies to "*all* circumstances in which the needs of prison administration implicate constitutional rights." 494 U.S. at 224 (emphasis added). There, the Court used the reasonableness standard to review the claim of a mentally ill prisoner challenging a prison policy that authorized his treatment with antipsychotic drugs. Rejecting the position that a higher standard of review was required because of the highly intrusive nature of antipsychotic drug treatment, *id.* at 218, the Court confirmed that a deferential standard of review best accommodates the competing principles that make the prison context a unique one. The Court explained that *Turner* applies "in *all* cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the

[2] The Court has been no more receptive to the argument "that heightened scrutiny is appropriate whenever regulations effectively prohibit, rather than simply limit, a particular exercise of constitutional rights." As the Court put it in *O'Lone*, "the presence or absence of alternative accommodations of prisoners' rights is properly considered a factor in the reasonableness analysis rather than a basis for heightened scrutiny." 482 U.S. at 349 n.2 (citing *Turner*, 482 U.S. at 88, 90-91).

First Amendment." *Id.* at 224 (emphasis added). Simply put, it does not matter whether "the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Id.* at 223.[3]

Turner and its progeny thus unequivocally demonstrate that prison policies that implicate the constitutional rights of prisoners—no matter what the source or nature of the right—are constitutional as long as they are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

B. This Court's Precedents Provide No Basis For An "Equal Protection Exception" To The *Turner* Standard.

Contrary to Petitioner's position, *see* Pet'r Br. at 24-27, this Court has never held or suggested that prison-based racial equal protection claims are subject to strict scrutiny. In adopting a "unitary" reasonableness standard for prison-based

[3] On a number of other occasions as well, the Court has steadfastly refused to create a hierarchy of standards of review based on the nature of the right alleged to have been infringed or the nature and degree of governmental infringement. *See, e.g., Overton v. Bazzetta*, 539 U.S. at 131 ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner."); *McKune v. Lile*, 536 U.S. 24, 36 (2002) ("A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction."); *Lewis v. Casey*, 518 U.S. 343, 361 (1996) (Turner's principle of deference has "special force" with regard to disciplinary and security concerns); *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989) ("[A] strict standard simply [is] not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons."). This refusal to create a hierarchy of constitutional rights in the prison context is consistent with the Court's general position that there is "no principled basis on which to create a hierarchy of constitutional values." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *City of Newport, Ky.* v. *Iacobucci*, 479 U.S. 92, 99 n.1 (1986) (per curiam) (Stevens, J., dissenting) ("all constitutional values are equivalent").

constitutional claims, including equal protection claims, the *Turner* Court articulated what was, implicitly, the standard of review controlling prison-based racial protection claims.

1. Petitioner relies most heavily on *Lee* v. *Washington*, arguing that "[t]he appropriate standard of review here is mandated . . . by the specific holding in *Lee*, where the Court affirmed that racial segregation of prison inmates violates the Fourteenth Amendment and is presumed invalid unless it survives strict scrutiny." Pet'r Br. 20. But *Lee* affirms no such thing.

In fact, *Lee* neither expressly nor implicitly applied strict scrutiny to prison-based equal protection claims. There, this Court, in a per curiam opinion, affirmed the district court's judgment ordering the desegregation of state prisons and jails. *Lee*, 390 U.S. at 333-34. The Court provided no analysis of the pertinent standard.

Moreover, the district court's decision, which this Court adopted, did no more than establish that a state law mandating the "complete and permanent segregation" of state prisons violates the Equal Protection Clause. *Washington* v. *Lee*, 263 F. Supp. at 331. Observing that "it is no longer open to question that a State may not constitutionally require segregation of public facilities," *id.* (internal quotation marks and alteration omitted), the district court went on to conclude that "no consideration of prison security or discipline [would] sustain the constitutionality of state statutes that on their face require *complete and permanent* segregation of the races in *all* the Alabama penal facilities," *id.* (emphasis added).

Thus, the district court restricted its opinion to claims involving segregation that is complete, permanent, and universally applied throughout a state prison system. Its analysis anticipated—and is consistent with—the *Turner* standard in its suggestion that such an arbitrary state policy is not and cannot be reasonably related to "consideration[s] of prison security or discipline."

Of particular pertinence here, the district court added that temporary segregation *would* be constitutionally permissible if supported by such considerations. Indeed, the court noted that in some instances "prison security and discipline *necessitates* segregation of the races." 263 F. Supp. at 331 (emphasis added). The court cited the example of the so-called "tank" in the City of Birmingham, where inmates were temporarily segregated by race. *Id.* at 331 n.6.

This Court's affirmance of the district court's decision was, in more general terms, an affirmation that the distinction between "complete and permanent segregation" and temporary segregation reasonably related to "consideration[s] of prison security and discipline" is practically necessary and constitutionally sound. The Court accepted the district court's decision in part on the ground that "the specific [district court] orders directing desegregation of prisons and jails make . . . allowance for the necessities of prison security and discipline." *Lee*, 390 U.S. at 333-34. In other words, the Court approved a desegregation plan for state prisons that allowed for temporary and limited race-based solutions to "the intractable problems of prison administration." *Turner*, 482 U.S. at 89.

In a concurring opinion, Justices Black, Harlan, and Stewart made the same point, though with greater emphasis:

> In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.

Lee, 390 U.S. at 334 (Black, Harlan, Stewart, JJ., concurring).

In short, nothing in this Court's opinion in *Lee*, or in the district court decision that it affirmed, suggests a blanket

holding that all racial distinctions made by prison authorities require strict scrutiny.

2. Petitioner and his *amici* also make much of the fact that, in other contexts, this Court has sometimes used the unqualified language of color-blindness in dealing with affirmative action claims. *See* Pet'r Brief 15-20, 23, 27-32, citing, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (higher education); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (higher education); *Adarand Constructors, Inc.* v *Peña*, 515 U.S. 200 (1995) (government contracting); *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (government contracting). Respondent does not dispute that strict scrutiny governs race-based classifications in such contexts. But nothing in those decisions, or in the opinions of individual Justices, suggests that the *Turner* standard has been or should be overruled with respect to race-based equal protection claims in prisons.

For example, Petitioner relies heavily upon this Court's statement that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); Pet'r Brief at 15. Petitioner fails to note, however, that this statement was responding to the assertion that so-called "benign" racial preferences are subject to something less than strict scrutiny. Specifically, the quoted language originated in this Court's decision in *Adarand*, in which the Court rejected the portion of *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), holding that the race of the preferred individual was "critical to the determination of which standard of review to apply." *Adarand*, 515 U.S. at 226-227. The Court overruled this holding with the statement that "all racial classifications" are subject to strict scrutiny—not just those that favor whites over blacks. *Id.*; *accord Grutter*, 539 U.S. at 353 (Thomas, J., dissenting).

Obviously, this statement and others like it were not designed to overrule, *sub silentio*, the Court's holding in

Turner and its progeny that, in the uniquely volatile prison context, the "reasonable relationship" test applies to "*all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper*, 494 U.S. at 224 (emphasis added). Such a reading of these statements would be especially inappropriate in light of this Court's repeated recognition that the prison context is unique. *See Thornburgh* v. *Abbott*, 490 U.S. at 407 (the rights of prison inmates "must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration.") (quoting *Turner*, 482 U.S. at 85).[4]

In sum, this Court should follow its prior precedents and decline to create a hierarchy of standards of review for prison-based constitutional claims. To do otherwise would require a stark departure from *Turner* as well as a host of other decisions.

II. APPLICATION OF THE *TURNER* STANDARD TO EQUAL PROTECTION CLAIMS OF THE SORT RAISED BY PETITIONER IS ESPECIALLY JUSTIFIED.

Creating an equal-protection "exception" to *Turner* would be equally inappropriate as a matter of policy. As shown below, racially motivated violence is one of the most intractable problems in American prisons. Prison

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[4] It would be difficult, indeed, to find a context analogous to the world behind prison walls. As one commentator has pointed out, for example, prisons cannot be analogized to schools because "they have different populations, different social functions, and different administrative problems. Behavior taken for granted in prisons would be considered aberrant in schools, indeed, probably in all other social contexts. No other institution so thoroughly controls and regiments its inmates or clients, denying them privacy and freedom of choice. In no other institution are relations so fraught with violence. It is a serious mistake to believe that what makes sense in the educational environment is appropriate for prisons." James B. Jacobs, *New Perspectives on Prisons and Imprisonment* 86-87 (1983).

administrators must have the discretion that *Turner* gives them to address this pressing concern. At the same time, the *Turner* standard is sufficiently rigorous to ensure that prison administrators will not be able to make racial classifications unrelated to legitimate penological objectives.

A. The *Turner* Standard Is Necessary To Ensure That Prison Authorities Can Address The Urgent Problem Of Race-Related Prison Violence.

1. Contrary to the position of Petitioner and his *amici*, *see* Pet'r Br. at 8 n.5, 34; Brief of Former State Corrections Officials as *Amici Curiae* in Support of Petitioner ("Corrections Officials' Brief") at 5-6, 10-16, there is a significant body of evidence that much of the violence in prison is motivated by racial hostility and perpetrated by race-based gangs.

As one commentator put it, "[a]nyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism . . . . Protecting staff from prisoners and prisoners from each other is a constant challenge." *Stefanow* v. *McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996); s*ee also Dawson* v. *Delaware*, 503 U.S. 159, 173 n.1 (1992) (Thomas, J., dissenting) (citing cases and scholarly writings that have taken note of prison-based racial violence).[5]

Indeed, "racial avoidance and conflict [is] the most salient aspect of the prisoner subculture." James B. Jacobs, *New*

[5] In *Turner*, the particularized circumstance that gave rise to restrictions on prison correspondence was "a growing problem with prison gangs." 482 U.S. at 91. Witnesses testified that "restricting communications among gang members, both by transferring gang members to different institutions and by restricting their correspondence, was an important element" in a strategy of "separating and isolating gang members." *Id.* at 91-92; *see also Thornburgh* v. *Abbott*, 490 U.S. at 412 (possession of subscription publications may allow other inmates to draw inference about gang affiliation.)

Perspectives on Prisons and Imprisonment 67 (1983). "Inside the prison interracial hostilities intensify because intraracial peer groups completely dominate the lives of the prisoners. Few, if any, other activities or interests compete for a prisoner's energies." *Id* at 71. In fact, for many prisoners, their criminal identity has been supplanted with a racial-ethnic one. John Irwin, *The Felon* 80-82 (1970).

The problem, moreover, is growing. The racial subculture of prison life "is an extension of gang life" on the outside. Jacobs, *supra*, at 71; *see, e.g.*, Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 Am. U. L. Rev. 41, 55-56 (1987) (prison population "is divided among identifiable gangs openly tied to Black, white, and Hispanic gangs simultaneously operating in the streets"). Accordingly, with gang membership in general on the rise, the proportion of prisoners affiliated with a prison gang has risen considerably over the last decade *See* National Criminal Justice Reference Service, *Gang Resources* 1, *available at* http://www.ncjrs.org/gangs/summary.html (last visited Aug. 6, 2004) ("According to a 1999 survey by the National Gang Crime Research Center, gang membership within adult state correctional facilities increased from 9.4% in 1991 to 24.7% in 1999."). And these racially separated gangs "are believed to be responsible for much of the violence in prisons." Scott N. Tachiki, Comment, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 Cal. L. Rev. 1115, 1126 (1995). Race-based prison gangs have "an endless capacity for violence. Gangs systematically rape and murder both prisoners who are not gang members and guards who interfere with their activities." Willens, *supra*, at 55-56.

2. The viciousness of race-based, gang-related prison violence is aptly demonstrated by the facts of *State* v. *Kell*, where a white supremacist savagely murdered an African

American inmate. 61 P.3d 1019, 1024-25 (Utah 2002). The Utah Supreme Court was appropriately shocked by the heinous nature of the attack:

> For over two and a half minutes, defendant slashed Blackmon with his shank, inflicting sixty-seven stab wounds . . . . Despite Blackmon's pleas to stop, defendant continued the assault and, in fact, after walking away, returned twice to inflict more wounds, until Blackmon lay motionless on the floor of the cell block.

Id. at 1025. The defendant in that case had previously "been involved in race-related altercations with several African-American inmates," *id.* at 1024, and there can be little doubt that the ferocity of the attack was motivated by the defendant's hatred of African Americans. And this case is just one of many that demonstrates that race-based prison violence is quite literally a matter of life and death.

3. Closely related to the problem of race-related gangs is the problem of inter-racial rape in prisons. Numerous studies of prison violence, including an exhaustive study of male rape by Human Rights Watch, have noted that inter-racial rape has reached epidemic proportions. *See* Human Rights Watch, United States, *No Escape: Male Rape in U.S. Prisons* (2001), *available at* http://www.hrw.org/reports/2001/prison/report.html.

Moreover, negligent celling, including celling together men who are "racially antagonistic," is one of several factors that increase the threat of prisoner rape. *Id.* at ch. VIII; *see also* Brief of Stop Prisoner Rape as *Amicus Curiae* in Support of Petitioner, *Farmer* v. *Brennan*, 511 U.S. 825 (1994) (No. 92-7247) (discussing race as a risk factor in prisoner rape); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. &

Criminology 127, 158-65 (2001) (citing studies that indicate "a clear relationship between race and prisoner rape").

In short, racial conflict and race-related violence within prisons is a national problem. *See* Jacobs, *supra*, at 71 ("In every region of the country, race is the most important determinant of an individual's prison experience.").[6]

4. Given the extent of racial violence associated in our Nation's prisons, it is no exaggeration to say that the discretion given to prison administrators under the *Turner* standard may be necessary to protect the safety—indeed, to protect the lives—of prison inmates. In fact, given the prevalence of racial violence, the failure to take segregative

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[6] The California Department of Corrections has faced particularly serious gang-related racial conflict. The state prison system is dominated by race-based prison gangs. *See* Willens, *supra*, at 56 n.69 (California is one of three prison systems most dominated by gangs); Jacobs, *supra*, at 68 (citing studies of racial polarization within the California prison system). And the problems caused by gang activity are "the chief operational fact of life inside California prisons." John J. Dilulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* 129 (1987). As one commentator has noted, "[f]or years in states such as California . . . prison gangs have terrorized fellow inmates, injured and killed staff members, trafficked in drugs and disrupted the delivery of prison services." *Id.* at 249. The result has been a series of "never-ending race wars." Micha Maguire, *Racism II, in Inside: Prison American Style* 84, 84 (Robert J. Minton, Jr. ed., 1971). Accordingly, inmate accounts of prison life within the California system describe a violent world where prisoners must racially self-segregate if they are to survive. *See* Frank L. Rundle, *The Roots of Violence at Soledad, in The Politics of Punishment: A Critical* Analysis of Prisons in America 163, 167-68 (Erik Olin Wright ed., 1973).

Given the dominance of prison gangs within the California prison system, it is hardly surprising that the CDC has been the scene of a "high level of racial violence." *Johnson*, 321 F.3d at 800 n.9 (describing numerous incidents of racial violence within the California prison system). For his part, moreover, Petitioner neither disputes that prison gangs are a fact of life in California prisons nor "disagree[s] that racial violence is pervasive in the CDC." *Id.* at 802.

measures "could be considered 'deliberate indifference' to prisoners' safety and could itself constitute a constitutional violation." *Johnson*, 321 F.3d at 807. *See Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001) (triable issue as to whether prison officials were deliberately indifferent to an excessive risk that prisoner would be harmed when he was placed in an integrated yard); Jacobs, *supra*, at 97-98 (policy of random cell assignment without regard to the reality of interracial violence could be viewed as deliberate indifference).

5. In light of the widespread and serious problem of racially motivated violence, moreover, a prison administrator could reasonably believe that it is both wise and responsible to avoid celling together new inmates of different races until the prison has an opportunity to determine their propensity for engaging in such violence. In fact, it is not obvious, as Petitioner and his *amici* suggest, that temporary segregative measures are ineffective in reducing interracial violence in prisons.

First, there is no consensus among prison experts that temporary segregative measures are ineffective. *See* Corrections Officials' Brief at 18-19. While it is true that *some* prison officials believe that total and complete integration is the best policy for avoiding racial violence, other officials disagree with this conclusion. In fact, 30 percent of wardens at maximum security prisons have expressed the belief that integrating individual prison cells "is likely to increase the level of violence in an institution." Martha Henderson et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295, 304 tbl. 5 (2000).[7]

[7] There is good reason why prison administrators disagree about the relationship between temporary segregative measures and racial violence. It is safe to say that, in terms of racial dynamics, no two prisons are alike:

> There is surely too much variation in overcrowding, administrative capacity, and prisoner subculture to expect a single rule of thumb to suffice. Even if prisons were identical in all of these respects, the fact that some contain prisoner populations with nearly equal numbers of [racial sub-groups], while others have a single race overwhelmingly in the majority, suggests that there will be different patterns of racial conflict and different strategies for control.

Jacobs, *supra*, at 81.

Petitioner and his *amici* expect this Court to second-guess the judgments of these seasoned prison administrators on what is potentially a matter of life and death.

Moreover, prior experience supports the conclusion that integration, undertaken with insufficient care by prison officials, can lead to increased violence. For example, in *White* v. *Morris*, the U.S. District Court for the Southern District of Ohio explained how integration contributed to a devastating prison riot:

> On April 11, 1993, the worst prison riot in Ohio history, and one of the worst in the United States history, erupted at the Southern Ohio Correctional Facility ("SOCF"). Nine inmates and one corrections officer were murdered and many others were injured during the eleven day standoff. During negotiations as well as after the riot, prisoners repeatedly cited integrated celling as a factor contributing to the tense atmosphere at SOCF. Among the demands the prisoners made as part of their agreement to end the siege, was that [the policy of integrated celling] be reviewed.

832 F. Supp. 1129, 1130 (S.D. Ohio 1993). While the Ohio experience may not be repeated in every case, it clearly suggests that, in some cases, integration can worsen already severe racial tensions in prisons.

6. The ongoing debate between prison officials about the best way to reduce racial violence in prisons demonstrates forcefully why federal courts should not subject prison policies to strict scrutiny. While penologists may disagree about the efficacy of particular measures to reduce racially based prison violence, it is the job "of prison administrators . . . and not the courts, to make the difficult

judgments concerning institutional operations." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 128. The federal courts are not in a better position than prison administrators to determine how best to reduce racial violence in prisons.

Indeed, this Court has often stated that questions of prison safety are "peculiarly within the province of the legislative and executive branches, of government," *Turner*, 482 U.S. at 84-85, and not within the expertise of the courts. *See, e.g.*, *Procunier* v. *Martinez*, 416 U.S. at 404-05; *Pell* v. *Procunier*, 417 U.S. at 827. And federalism concerns strongly "counsel a policy of judicial restraint" where a state penal system is involved *Turner*, 482 U.S. at 85 ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."); *see also Lewis v. Casey*, 518 U.S. at 387 (Thomas, J., concurring) ("State prisons should be run by state officials with the expertise and the primary authority for running such institutions.").

The problem with strict scrutiny in this context is, as this Court put it in *Turner*, that it would make courts "the primary arbiters of what constitutes the best solution" to the problems of prison administration. 482 U.S. at 89. Simply put, such a rule would place impossible burdens on prison administrators:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.

Id.

In short, subjecting equal protection claims to strict scrutiny would fail to accord deference to the appropriate prison authorities. That would make "an already daunting task virtually impossible." *Lewis* v. *Casey*, 518 U.S. at 387 (Thomas, J. , concurring).[8]

B. The *Turner* Standard Is Sufficient To Prevent Invidious Discrimination.

Finally, Petitioner and his *amici* are wrong to suggest that adherence to the *Turner* standard in this context will give prison administrators license to engage in invidious discrimination under the guise of protecting prison security. This Court adopted the *Turner* standard "with confidence that . . . a reasonableness standard is not toothless." *Thornburgh v. Abbott*, 490 U.S. at 414 (internal quotation marks omitted). The *Turner* standard is designed to "smoke out" arbitrary or irrational state actions. *See Turner*, 482 U.S. at 89-90 ("[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."). And it is fully capable of discerning illegitimate uses of racial criteria.

In *Turner* itself, the Court struck down a regulation restricting the rights of prisoners to marry as an "exaggerated response to . . . security objectives." *Id.* at 98. There is no

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[8] Petitioner's claim would affect not only racial classifications but also all classifications which require equal protection analysis. A separate standard for equal protection claims could not logically be limited to racial classifications, but would require close, equal-protection scrutiny of all forms of prison classifications. Prison administrators would be required to more carefully examine classifications based upon a prisoner's gender, *see, e.g.*, *Pitts* v. *Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (applying heightened scrutiny to prison-based claims of gender discrimination), and would have to closely examine differential treatment of prisoners with mental and physical impairments. *Cf. City of Cleburne, Tex.* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

reason to think that similarly arbitrary or irrational measures, including raced-based ones, will not meet a similar fate.

Far from giving governmental authorities license to trample on the constitutional rights of prison inmates, the *Turner* test requires prison officials to articulate the "particularized circumstances" that justify a restriction on a prisoner's rights. *See, e.g., id.* at 91-93 (testimony at trial supports contention that correspondence provision was promulgated primarily for security reasons); *cf. Thornburgh* v. *Abbott*, 490 U.S. at 419 ("prison officials [must be] able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm"). The relevant factors identified in *Turner* "serve to channel" the reasonableness inquiry, *id.* at 414, ensuring that prison authorities do not enjoy the kind of "unbounded discretion [that] carries with it grave potential for abuse." *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting).

Thus, while *Turner* gives broad discretion to prison officials to prevent disorder, *see Shaw v. Murphy*, 532 U.S. at 232; *Thornburgh v. Abbott*, 490 U.S. at 413, it does not give them free range to presume or speculate, or to invent security rationales at odds with common sense. Nor is a "generalized or vague fear of racial violence . . . a sufficient justification for a broad policy of racial segregation." *Sockwell* v. *Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (citing *United States* v. *Wyandotte County, Kan.*, 480 F.2d 969, 971 (10th Cir. 1973)) (relying on *Lee* to strike down "general policies of racial segregation in prison housing and administration").

Applying *Turner*, courts will be able to prevent arbitrary, pretextual uses of race, as they have in the past. *See Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (rejecting magistrate's grant of summary judgment where magistrate "simply chose to believe the conclusory statements by the prison officials that they had confined [a black inmate] merely for security reasons"). For example, the *Turner* factors

would preclude complete and permanent segregation of the races in violation of *Lee*, 390 U.S. at 333-34. And *Turner* would clearly not allow prison officials to justify the preferential treatment of one race. *See Johnson*, 321 F.3d at 799 n.7 (racially preferential treatment "could not be sustained as neutral").[9]

To be sure, there is little doubt that some measures taken in response to the unique requirements of prison administration "would raise grave . . . concerns outside the prison context." *Thornburg* v. *Abbott*, 490 U.S. at 407. *See also Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 133 n.9 ("The informed decision of prison officials that there is potential danger may be sufficient for limiting rights even though this showing might be 'unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public.'") (ellipsis in original) (quoting *Pell* v. *Procunier*, 417 U.S. at 825). What is clear, however, is that while *Turner* gives

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[9] With regard to race-based equal protection claims, the "bite" of *Turner* was borne out in *Morrison v. Garraghty*, in which the Fourth Circuit struck down a prison policy that gave preference to prisoners of Native American heritage. 239 F.3d 648 (4th Cir. 2001). There, a prison inmate alleged that his equal protection rights had been violated when his request to obtain Native American religious items was denied because he was not of Native American heritage. The Fourth Circuit found that prison authorities had "failed . . . to demonstrate that the race-based . . . policy [was] reasonably related to this legitimate penological interest." *Id.* at 660. The court noted that while prison officials "perhaps could have prohibited inmate possession of the requested items because they threaten prison safety and security, they have chosen not to do so." *Id.* The policy at issue "allow[ed] consideration of requests for religious exemptions from the personal property restrictions submitted by Native American inmates . . . but which unequivocally denies non-Native Americans . . . the same consideration solely on the basis of their lack of membership in the Native American race." *Id.* The Court considered the claim that such a policy promoted prison security and, under the *Turner* standard, concluded that the prison policy was not "rationally related to the goal of prison safety." *Id.*

prison officials the "ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," 482 U.S. at 89, *Turner* also gives courts the power to smoke out constitutionally illegitimate uses of race.

* * * *

Almost two decades ago, this Court adopted a deferential standard that it understood would apply, and subsequently interpreted as applying, to *all* non-Eighth Amendment constitutional claims challenging conditions of confinement in the Nation's penal institutions. There simply is no basis in law or sound policy for this Court to revisit that conclusion by creating a potentially limitless and dangerous "exception" for equal protection claims. If anything, the increase in gang-related activity and prison violence since *Turner* make it even more important to adhere to the standard adopted there. If prison officials are to be subjected to a higher standard when dealing with the inherent tension between constitutional values and the needs of prison security, that standard should be imposed by a duly authorized legislative or executive authority, not by the federal courts.

CONCLUSION

The decision by the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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